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Response of Ontario to Federal-Provincial Task Force on Uniform Rules of Evidence

March 18, 1981

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Response of Ontario to Federal-
Provincial Task Force on Uniform
Rules of Evidence

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Office of the
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18 King Street East
Toronto Ontario
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March 16, 1981.

Mr. Padraig O'Donoghue,
President,
Uniform Law Conference of Canada,
Office of the Deputy Minister,
Department of Justice,
Government of Yukon,
Box 2703,
Whitehorse, Yukon.
Y1A 2C6

Dear Mr. O'Donoghue:

I am pleased to be able to send you the comments of the Ontario representatives on the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, which have been prepared for the Special Plenary Session on Evidence Law to be held in Ottawa from April 6 to April 10.

Copies of this document have been circulated to all Local Secretaries for distribution to those attending the Evidence Conference.

Yours very sincerely,

H. Allan Leal
H. Allan Leal,
Deputy Attorney General.



Office of the
Deputy Attorney
General

Ministry of the Attorney General

18 King Street East
Toronto Ontario
M5C 1C5

March 18, 1981

MEMORANDUM TO: Mr. H. Allan Leal
Deputy Attorney General

FROM: Mr. R.S.G. Chester
Executive Counsel

RE: Ontario Response to the Report
of the Federal/Provincial Task
Force on Uniform Rules of Evidence

The following document represents a consolidated summary of the responses of the Ontario Evidence Reform Working Group to the recommendations for reform contained in the proposed draft Uniform Evidence Act.

1.15 Recommendations

(a) unanimously, that unless otherwise provided in the Uniform Evidence Act or any other enactment, the provisions of the Uniform Evidence Act shall apply in all proceedings before a court or for the taking of evidence for use in court;

DECISION Approved - March 16 - 1635 hours.

(b) unanimously, that the Uniform Evidence Act should state in general or specific terms the meaning of the word "court" and the meaning of the words "proceedings";

DECISION Approved - March 16 - 1635 hours.

(c) unanimously, that the Uniform Evidence Act should not apply to examination for discovery in civil cases, which should be permitted to develop according to precedent and local rules of court;

DECISION Approved - January 29th - 1205 hours.

(d) unanimously, that the Uniform Evidence Act should not apply to proceedings relating to either

- i) the issuance of a summons or warrant, or
- ii) judicial interim release from custody;

DECISION Approved - March 16 - 1624 hours; subject to addition after "proceedings" of words "not taking place during the hearing of evidence at a preliminary inquiry, or the guilt stage of the trial, or an appeal" and deletion of two subsections.

(e) by a majority, that the Uniform Evidence Act should apply to a hearing regarding the fitness of an accused to stand trial except as to the burden of proof which should be left to the common law;

DECISION Approved - March 16 - 1420 hours: To reword the section to read "the burden of proof in a hearing regarding the fitness of an accused to stand trial should be left to the common law". The general reference in the section ought to be deleted. Finally, s. 4 of the draft Act should be moved to Part II dealing with rules of proof.

(f) unanimously, that the Uniform Evidence Act should apply to a preliminary inquiry;

DECISION Approved, subject to the proviso that the recommendation is to be read subject to recommendation 13.1(z) on p. 223, which provides that the quantum of proof of voluntariness in a voir dire in a preliminary inquiry be on a preponderance of probabilities.

(g) by a majority, that the Uniform Evidence Act should not apply to proceedings relating to either

- i) sentencing, including the granting of probation or an absolute or conditional discharge, or
- ii) revocation of probation;

DECISION Rejected - March 16 - 1630 hours: in light of amended d) supra.

(h) by a majority, that the Uniform Evidence Act should not apply either in whole or in part to proceedings before administrative tribunals;

DECISION Approved - March 16 - 1630 hours: To agree to the section amended to read "that the Uniform Evidence Act should not, unless otherwise provided, apply either in whole or in part to proceedings before administrative tribunals.

(i) unanimously, that in all civil proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province where such proceedings are commenced, subject to this and other Acts of the Parliament of Canada, shall apply to such proceedings;

DECISION Approved - January 29th - 1357 hours.

(j) unanimously, that in criminal proceedings the laws of evidence in force in the province in which such proceedings are commenced, relating to documents, including warrants, summonses and subpoenae, and service thereof, subject to this and other Acts of the Parliament of Canada, shall apply to such proceedings;

DECISION Rejected - March 16 - 1615 hours in favour of the existing section 37 of the Canada Evidence Act which provides that "in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which the proceedings are taken, including the laws of proof of service of any warrant, summons,

subpoena, or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings" being fully incorporated into the new Act.

(k) unanimously, that section 53 of the Federal Court Act be amended or revoked if the foregoing recommendation is enacted;

DECISION Approved - January 29th - 1429 hours.

(l) unanimously, that provincial Evidence Acts should not contain a provision by which reference would be made to federal evidence law;

DECISION Approved - January 29th - 1432 hours.

(m) unanimously, that provincial legislation contain no provision regarding reciprocal application of evidence rules as between provinces;

DECISION Approved - January 29th - 1441 hours, subject to deletion of the word "reciprocal", so that the recommendation would read "that provincial legislation contain no provision regarding application of evidence rules as between provinces".

(n) unanimously, that the Uniform Evidence Act incorporate provisions to the same effect as those contained in Part II of the Canada Evidence Act and section 65 of the Draft Evidence Act proposed by the Ontario Law Reform Commission;

DECISION Rejected - March 16 - 1610 hours in favour of addition to section 209 line 12 of the following words, after "civil proceeding": "unless the interrogating party establishes that if required to answer or produce any record such evidence could not be used against him or on the ground that if he were located in the jurisdiction of the court that made the order he could not be compelled to produce the record at a trial of the matter in question before the court that made the order".

(o) unanimously, that the Trial Division of the Federal Court of Canada be authorized to act upon letters rogatory issued by a foreign court;

DECISION Rejected - March 16 - 1620 hours:
The Federal Court of Canada should only have jurisdiction over letters rogatory in matters which fall within the jurisdiction of the Federal Court.

(p) unanimously, that a Canadian court making an order for the taking of evidence relating to proceedings outside Canada should have the power to order production of "things" as well as documents or writings;

DECISION Approved - January 29th - 1532 hours.

(q) unanimously, that the Uniform Evidence Act make specific reference to the preservation of the privilege against self-incrimination, both with respect to answering questions and producing documents, in relation to the taking of evidence for use outside Canada;

DECISION Rejected - March 16 - 1625 hours, in light of recommendation n) supra.

(r) unanimously, that no legislation be enacted respecting the procedure to be followed during the taking of evidence outside Canada for use in proceedings in courts in Canada;

DECISION Approved - January 29th - 1534 hours.

(s) by a majority, that the lack of an oath or affirmation should not of itself be a basis for excluding evidence relating to proceedings in courts in Canada which is taken outside Canada;

DECISION Rejected - March 16 - 1425 hours.

(t) unanimously, that the evidentiary law of a province seeking evidence on commission should be the applicable law when the evidence is taken in another province; and

DECISION Approved - January 29th - 1548 hours.

(u) by a majority, that nothing be stated in the Uniform Evidence Act about the relationship between the Act and the common law.

DECISION Rejected - January 29th - 1552 hours.

NEW RECOMMENDATION

(v) that section 212 should also contain a provision similar to section 61 of the current Uniform Evidence Act.

CHAPTER 2

BURDENS OF PROOF AND PRESUMPTIONS

2.5

Recommendations

(a) unanimously, that the test enunciated by the Supreme Court of Canada in U.S.A. v. Shephard be adopted by the Uniform Evidence Act as the test of whether the Crown has introduced sufficient evidence to satisfy the evidential burden;

DECISION Approved - February 10th - 1013 hours, subject to the following conditions: the recommendation should be limited to criminal cases, we have objections to the wording of sections 9 and 12, and finally, the section should be amended by adding a closing flush which speaks in terms of a directed verdict.

(b) unanimously, that the same test as recommended in (a) apply to a committal for trial at a preliminary hearing;

DECISION Approved - February 10th - 1014 hours.

(c) unanimously, that the legal burden of proof in a civil case be on the party making the claim and be on the preponderance of probabilities;

DECISION Approved - February 10th - 1019 hours, subject to deletion of word "legal" and substitution of word "balance" for "preponderance", so that recommendation would read "that the burden of proof in a civil case be on the party making the claim and be on the balance of probabilities".

(d) by a majority, that a provision in the Uniform Evidence Act set forth recommendation (c);

DECISION Approved - February 10th - 1020 hours.

(e) unanimously, that the legal burden on the prosecution in a criminal proceeding or provincial prosecution be beyond a reasonable doubt.

DECISION Approved - February 10th - 1021 hours, subject to removal of the word "legal" and addition of words "proof of guilt", so that recommendation would read "that the burden on the prosecution in a criminal proceeding or provincial prosecution be proof of guilt beyond a reasonable doubt".

(f) by a majority, that a provision in the Uniform Evidence Act set forth recommendation (e);

DECISION Approved - February 10th - 1022 hours.

(g) unanimously, that the burden of proof on the accused on the issue of insanity be on the preponderance of probabilities;

DECISION Approved - February 10th - 1022 hours, subject to substitution of the word "balance" for preponderance so the section would read "that the burden of proof on the accused on the issue of insanity be on the balance of probabilities". It was further noted that this section should be in the Act.

(h) unanimously, that the Rule in Hodge's Case be abolished by legislation;

DECISION Approved - February 10th - 1023 hours, with the observation that it would be necessary to amend sections 13 and 16.

(i) by a majority, that the burden of proof in summary conviction and indictable offences involving exceptions, exemptions, provisoies, excuses or qualifications be on the accused on a balance of probabilities unless otherwise provided;

DECISION Approved - February 10th - 1030 hours, with the proviso that it be noted that recommendation (i) was also subject to recommendations 2.5 (k) and (l).

(j) by a majority, that except for the presumption of legitimacy and any statutory provision to the contrary, the quantum of proof required to dispel a presumption that shifts the legal burden in a civil case, in general, be the balance of probabilities;

DECISION Approved - February 10th - 1041 hours, subject to the addition of the words "where it exists", the deletion of the word "legal" and the addition of the words "of proof" so that the recommendation would read "that except for the presumption of legitimacy, where it exists, and any statutory provision to the contrary, the quantum of proof required to dispel a presumption that shifts the burden of proof in a civil case, in general be the balance of probabilities".

(k) unanimously, that where a penal statute explicitly allocates the proof of any matter, in a criminal proceeding or provincial prosecution, to the accused using such terminology as "the proof of which shall be on him" or "unless he establishes", the burden of proof be on the accused on a balance of probabilities;

DECISION Approved - February 10th - 1048 hours, with the addition of the words "on that issue" so that the section would read "that where a penal statute explicitly allocates the proof of any matter, in a criminal proceeding or provincial prosecution, to the accused using such terminology as "the proof of which shall be on him" or "unless he establishes", the burden of proof on that issue be on the accused on a balance of probabilities".

(l) unanimously, that where a penal statute does not explicitly impose a burden of proof upon the accused, but provides for a presumption adverse to him using such terminology as "shall be presumed in the absence of evidence to the contrary" or "is prima facie proof", the effect of the presumption be dispelled by evidence that raises a reasonable doubt as to the existence of the presumed fact; and

DECISION Approved - February 10th - 1049 hours.

(m) unanimously, that where there is a conflict between presumptions, the one with the superior public policy foundation prevail.

DECISION Rejected - February 10th - 1053 hours, instead of the recommendation, the Committee would prefer the rule embodied in section 704(2) of the American Law Institute's model code of Evidence which provides that "when the basic fact for presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action".

CHAPTER 3 FORMAL ADMISSIONS

3.6 Recommendations

(a) by a majority, that a party in any criminal or civil proceeding may admit any fact alleged against him for the purpose of dispensing of proof thereof, but such admission is only proof against the party making it;

DECISION Approved - February 10th - 1104 hours, subject to addition of requirement that in criminal cases only with the consent of the Crown.

(b) by a majority, that the opposing party may adduce other evidence of a fact formally admitted, subject to a sanction in costs in civil cases if the court feels such evidence does not materially add to or clarify the fact admitted;

DECISION Approved - February 10th - 1105 hours, subject to addition of the words "in both civil and criminal proceedings" so that the recommendation reads "that the opposing party may adduce other evidence of a fact formally admitted in both civil

and criminal proceedings, subject to a sanction in costs in civil cases if the court feels such evidence does not materially add to or clarify the fact admitted".

(c) unanimously, that for the purposes of recommendations (a) and (b), a fact includes one whose admissibility depends on a ruling of law or mixed law and fact;

DECISION Approved - February 10th - 1110 hours.

(d) unanimously, that in criminal cases the right to make formal admissions be extended to the Crown; and

DECISION Approved - February 10th - 1111 hours, subject to addition of the words "with the consent of the accused".

(e) by a majority, that no recommendation be made with respect to a particular manner or time when formal admissions can be made.

DECISION Approved - February 10th - 1112 hours, providing that recommendation 3.6(a) is amended as suggested.

(f) Ontario denies that there is any need for the power of the court to prevent abuse of process to be expressly included here or in a more general provision: see question following section 21 of draft act.

CHAPTER 4

JUDICIAL NOTICE

4.8 Recommendations

- (a) unanimously, that once the judge has decided to take judicial notice it be conclusive of the matter, subject only to appeal on the issue whether the taking of judicial notice was proper;

DECISION Approved - February 10th - 1144 hours.

(b) unanimously, that judicial notice of law which is contained in an Imperial Act in force in the jurisdiction, in a domestic statute, or in delegated legislation which has been published in the official gazette of the jurisdiction be mandatory;

DECISION Approved - February 10th - 1145 hours, subject to substitution of the words "federal or provincial" for "domestic". (Note that this recommendation reduces the need for recommendations (u), (v) and (y).)

(c) unanimously, that apart from (b), judicial notice be in the discretion of the judge;

DECISION Approved - February 10th - 1145 hours.

(d) by a majority, that there be a legislative statement of judicial notice of "adjudicative fact" which stipulates that judicial notice may be taken of facts

- i) that are so generally known and accepted within the jurisdiction of the court that they cannot reasonably be disputed, or
- ii) that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned;

DECISION Approved - February 10th - 1330 hours.

(e) unanimously, that there be no legislative statement regarding the concept of "legislative fact", because it is judicial reasoning rather than evidence;

DECISION Approved - February 10th - 1335 hours.

(f) unanimously, that the law governing judicial notice of domestic statute law be made uniform;

DECISION Approved - February 10th - 1335 hours.

(g) unanimously, that judicial notice be taken of Imperial statutes in force in the jurisdiction;

DECISION Approved - February 10th - 1335 hours.

(h) unanimously, that domestic statute law, both public and private, be judicially noticed;

DECISION Approved - February 10th - 1335 hours.

(i) that judicial notice be taken of the following delegated legislation;

- i) unanimously, ordinances,
- ii) unanimously, orders-in-council, proclamations and regulations that have been gazetted,
- iii) by a majority, municipal by-laws that have been published in the official gazette of the jurisdiction, and
- iv) unanimously, rules of pleading, practice and procedure that have been published in the official gazette of the jurisdiction;

DECISION Approved - February 10th - 1355 hours, subject to addition of new sub-recommendation (i) iii)(a) reading "in the case of municipal by-laws in criminal proceedings or prosecutions under provincial statutes, the court shall take judicial notice of any by-law relevant to the proceeding, unless the accused establishes that there is an arguable ground why the Crown should be required to prove the by-law in the normal manner or in the manner prescribed by paragraph (j) ii)."."

(j) that a simplified means of proof be provided for delegated legislation which has not been published in the official gazette of the jurisdiction, and in particular

- i) by a majority, that in the case of orders-in-council, proclamations and regulations the means of proof include a certified copy or exemplification, a photocopy signed by the appropriate official or which includes the portion of the order bearing the signature of the Clerk of Cabinet or other proper official, in addition to duplicates or copies which accord with the Task Force recommendations on authentication of documents,

ii) by a majority, that in the case of municipal by-laws in both civil and criminal proceedings, the means of proof include the tender of a certified copy or exemplification of the by-law, and that in civil cases only, temporary filing of a copy of the bound volume containing the by-law be permitted and given the effect of a formal admission that the book contains a true copy of the by-law;

DECISION Approved - February 10th - 1400 hours, subject to deletion of the words in recommendation (j) ii) "both", "and criminal", "or exemplification", and "in civil cases only". The recommendation will now read "that in the case of municipal by-laws in civil proceedings, the means of proof include the tender of a certified copy of the by-law, and that, temporary filing of a copy of the bound volume containing the by-law be permitted and given the effect of a formal admission that the book contains a true copy of the by-law".

(k) unanimously, that rules of pleading, practice and procedure which have not been published in the official gazette of the jurisdiction not be judicially noticed;

DECISION Approved - February 10th - 1402 hours.

(l) unanimously, that official records of the proceedings of a body of a legislative, executive or judicial nature not be the subject of judicial notice;

DECISION Approved - February 10th - 1405 hours.

(m) unanimously, that seals and signatures attached to official documents are properly matters of presumption rather than of judicial notice;

DECISION Approved - February 10th - 1405 hours.

(n) unanimously, that judicial notice not be taken of the rules of professional conduct for members of the Bar;

DECISION Approved - February 10th - 1406 hours.

(o) unanimously, that the production of legislation not be required where judicial notice is mandatory;

DECISION Approved - February 10th - 1408 hours.

(p) unanimously, that no procedure is needed to guarantee that legislation being judicially noticed is current;

DECISION Approved - February 10th - 1408 hours.

(q) unanimously, that the statutory provisions governing judicial notice of statute law be in the Uniform Evidence Act;

DECISION Approved - February 10th - 1409 hours.

(r) unanimously, that judicial notice of domestic decisional law not be legislated;

DECISION Approved - February 10th - 1410 hours, subject to amendment of section 24(a) to read "decisional law of federal courts and the courts of another province that would otherwise be required to be proved as a fact".

(s) unanimously, that judicial notice of customary international law not be legislated;

DECISION Approved - February 10th - 1411 hours.

(t) unanimously, that a simplified method of proof of treaties similar to that provided by sections 20 and 21 of the Canada Evidence Act be continued;

DECISION Approved - February 10th - 1421 hours.

(u) unanimously, that federal legislation require judicial notice to be taken of Imperial acts in force in a province, provincial statute law and delegated legislation published in the official gazette of the province;

DECISION Approved - February 10th - 1425 hours, it being understood that this recommendation was encompassed in section 23(1)(b).

(v) unanimously, that provincial legislation require judicial notice to be taken of Imperial acts in force federally, federal statute law and delegated legislation published in the Canada Gazette;

DECISION Approved - February 10th - 1426 hours, it being understood that this recommendation was encompassed in section 23(1)(b).

(w) unanimously, that judicial notice not be taken of the statutory and case law of other countries including nations of the British Commonwealth (except to the extent that Imperial law forms part of the Canadian law);

DECISION Approved - February 10th - 1429 hours.

(x) by a majority, that where the applicable foreign law is not proved, the court apply the domestic law;

DECISION Approved - February 10th - 1437 hours, subject to section 423(3) of the Criminal Code.

(y) by a majority, that provincial Evidence Acts provide that where it is relevant judicial notice be taken of the law in force in another province or territory of Canada pursuant to Imperial act, statute or delegated legislation which has been published in the official gazette of the jurisdiction in question;

DECISION Rejected - February 10th - 1442 hours, in favour of the approach embodied in section 23(1)(b); in addition, the words "where it is relevant" ought to be deleted.

(z) by a majority, that provincial Evidence Acts provide that judicial notice may be taken of the law of another province or territory wherever the court would have discretion to take judicial notice of its own domestic laws;

DECISION Approved - February 10th - 1446 hours.

(aa) unanimously, that it is not necessary to legislate a procedure to be followed in determining whether to take judicial notice;

DECISION Approved - March 16th - 1640 hours, subject to the addition of the words "but opportunity to be heard should be given". In addition, section 25 should be amended to reflect this recommendation.

(ab) unanimously, that judicial notice be possible at all stages of the proceedings, but that the legislation need not say so; and

DECISION Approved - February 10th - 1446 hours, subject to section 25 being amended to reflect this recommendation.

(ac) unanimously, that no limitations be imposed by statute on the sources which the judge may consult in order to decide the propriety of taking judicial notice.

DECISION Approved - February 10th - 1447 hours.

CHAPTER 5 ESTOPPEL

5.2 Recommendations

The Task Force makes no recommendations concerning estoppel.

DECISION Approved - February 10th - 1450 hours.

CHAPTER 6 RELEVANCE

6.3 Recommendations

The Task Force unanimously opposes the enactment of a section defining the general principle of relevance.

DECISION Approved - February 10th - 1508 hours, with a suggested rewording of section 26: "All relevant evidence is admissible, unless it is excluded by the provisions of this Act or any other law of evidence in force in the province."

CHAPTER 7

CHARACTER EVIDENCE

7.9

Recommendations

(a) by a majority, that section 142 of the Criminal Code be amended, and within the majority there are two alternative proposals -

i) The recommendation with the greater support is to repeal section 142 and replace it with a provision comparable to the following,

Where an accused is charged with a sexual offence, evidence relating to the complainant's sexual conduct other than with the accused may not be offered or elicited on cross-examination, by or on behalf of the accused, except,

- A. evidence of prostitution by the complainant,
- B. evidence that tends to show that the accused could have believed that the complainant consented to the conduct which is the subject of the charge against the accused and that is offered otherwise than by the testimony of the complainant, or
- C. evidence to rebut evidence of the complainant's sexual conduct or lack thereof, that was previously introduced by the prosecution.

DECISION Rejected - March 9 - 1055 hours.

ii) The other alternative is to amend section 142 as follows,

- A. to apply to all sexual offences, regardless of the sex of the victim,
- B. to amend paragraph 142(1)(b) to read comparably as follows,

The judge, magistrate or justice, after holding a hearing in camera in the absence of the jury, if any, is satisfied that the evidence is relevant to a material issue in the proceedings and that the weight of the evidence is such that to exclude it would prevent the making of a just determination of that issue, and

C. to provide that the complainant is not a compellable witness on the hearing in camera;

DECISION Approved - March 9 - 1055 hours subject to replacement of words "the evidence is relevant to a material issue in the proceedings" by "there is a substantial nexus between the previous sexual conduct and that which is in issue on the alleged offence before the court".

(b) by a majority, that evidence of general reputation be inadmissible to prove the disposition or conduct of an accused;

DECISION Rejected - March 9 - 1006 hours.

(c) unanimously, that expert but not lay opinion be admissible as evidence of an accused's character or disposition;

DECISION Rejected - March 9 - 1006 hours

(d) by a majority, that section 593 of the Criminal Code be amended to read as follows,

593.(1) Where at a trial, evidence is adduced by or on behalf of the accused of his character or disposition, the prosecution may, before a verdict is returned, adduce evidence tending to rebut the evidence so adduced, including evidence of any previous convictions or findings of guilt of the accused for any offence that is relevant to such rebuttal,

(2) Where the accused testifies and evidence of his previous convictions is admitted under subsection (1), such evidence may also be considered in relation to the credibility of the accused;

DECISION Rejected - March 9th - 1007 hours.

(e) by a majority, that sections 317 and 318 of the Code be retained;

DECISION Approved - February 10th - 1532 hours.

(f) unanimously, that sections 317 and 318 be confined to a possession charge standing alone except where the possession charge is joined with a count that alleges an offence of theft or breaking and entering and theft (paragraph 306(1)(b) of the Code);

DECISION Approved - February 10th - 1532 hours.

(g) unanimously, that the notice time should be increased to seven days prior to the proceeding, subject to the trial judge's discretion;

DECISION Approved - February 10th - 1533 hours.

(h) unanimously, that the accused be able to adduce evidence of a character trait of the victim relevant to his defence;

DECISION Approved - March 9 - 1018 hours with addition of words "where known to the accused at the time, and where not known to the accused, if the evidence of the character trait is of such probative value as to meet the test for the admissibility of similar fact evidence".

(i) unanimously, that if the accused adduces evidence of a character trait of the victim relevant to his defence, the Crown be able to adduce evidence of the victim's character in rebuttal;

DECISION Approved - March 9 - 1019 hours.

(j) unanimously, that if the defence brings out evidence of a character trait of the victim during cross-examination of Crown witnesses, the Crown be able to introduce evidence in its case in chief to show that the victim's character was other than suggested by the answers given in cross-examination;

DECISION Approved - March 9 - 1019 hours.

(k) unanimously, that if the accused relies on a defence of self-defence in a homicide case, the Crown be able to introduce evidence of the victim's reputation for peacefulness whether the defence has made a direct attack on the character of the victim or not;

DECISION Approved March 9 - 1020 hours.

(l) unanimously, that recommendation (k) supra also apply in assault cases other than homicide where the victim is unavailable as a witness through death or mental or physical illness that prevents him from testifying;

DECISION Approved - March 9 - 1020 hours.

(m) unanimously, that if the accused through putting the victim's character in issue is found to have put his own character in issue, the Crown may adduce evidence of the accused's character in the same manner and to the same extent as if the accused had put his character in issue directly; and

DECISION Approved - March 9th - 1020 hours.

(n) by a majority, that the Crown not be allowed to introduce evidence of a relevant trait of the victim's character when the accused has neither expressly nor impliedly put the victim's character in issue.

DECISION Rejected - March 9th - 1020 hours.

QUAERE: Should (h) to (n) be in Evidence Act or Criminal Code?

CHAPTER 8 EXPERT WITNESSES

8.8 Recommendations

(a) unanimously, that in regard to civil proceedings, there should be a provision that requires a compulsory exchange of expert reports as a condition precedent to calling the expert evidence without leave of the court;

DECISION Approved - February 12th - 1003 hours.

(b) unanimously, that the exchange of expert reports must take place at least ten days before trial;

DECISION Approved - February 12th - 1003 hours.

(c) by a majority, that any party can introduce the expert's report, which has been exchanged, without necessarily having to call the expert as a witness;

DECISION Approved - February 12th - 1003 hours.

(d) by a majority, that the provision, which could be enacted either in an Evidence Act or in rules of civil procedure, would state that,

- i) a statement in writing setting out the opinion of an expert is admissible in evidence without proof of the expert's signature if a copy of the written statement is furnished to every party to the proceeding who is adverse in interest to the party tendering the statement at least ten days before the commencement of the trial.
- ii) the written statement shall set out the expert's name, address and qualifications, including experience, and a full statement of the proposed testimony;
- iii) where the written statement of an expert is given in evidence in a proceeding, any party to the proceeding may require the expert to be called as a witness;
- iv) where the expert has been required to give evidence under subsection (iii), and the trial judge is of the opinion that the evidence so obtained does not materially add to the information in the statement furnished under subsection (i), he may order the party that required the attendance of the expert to pay, as costs, such sum as the trial judge considers appropriate, and
- v) unless subsection (i) has been complied with, no expert witness may testify without leave of the trial judge;

DECISION Approved - February 12th - 1003 hours.

(da) approve section 43 as drafted;

DECISION Approved - February 12th - 1003 hours, that section 43 be approved as drafted. Section 43 reads "for the purpose of proving that a copy of an expert's statement was furnished to any party, the court may accept an affidavit made by the proponent".

(e) by a majority that the Evidence Acts be amended to provide that a witness may testify as to his opinion on an ultimate issue in the case if the trial judge concludes that it would be helpful to the trier of fact to receive such evidence;

DECISION Approved - February 12th - 1042 hours, subject to the addition of the three conditions set forth on page 118 that the trial judge should have the discretion,

- i) to prevent the witness from giving opinion on the ultimate issue if he can testify in greater detail and more precisely;
- ii) to require counsel to lay a foundation, setting forth the factual basis of the opinion before asking for it; or
- iii) to disallow the question where the answer is unnecessary or unhelpful to the trier of fact.

(f) unanimously, that in civil proceedings, there should be a mechanism for court-appointed experts;

DECISION Approved - February 12th - 1118 hours.

(g) unanimously, that the enactment, which could be included in an Evidence Act or in rules of civil procedure, should contain the following provisions -

- i) on the application of any party, or on his own motion, a judge may, at any time, order the appointment of one or more independent experts to inquire into and report on any question of fact or opinion relevant to any issue in the action;

- ii) the court expert shall be named by the judge and, where possible, shall be an expert agreed upon by the parties;
- iii) the order shall contain the instructions to be given to the court expert and the judge may, from time to time, make such further orders as he deems necessary to enable the court expert to carry out the instructions, including the examination of any party or property and the making of experiments and tests;
- iv) the court expert shall file copies of the report with the court in such number as the judge may direct, and the appropriate official of the court shall send copies of the report to the parties or their solicitors;
- v) the judge may direct the court expert to make a further and supplementary report;
- vi) the report of a court expert may be received in evidence;
- vii) any party may, at the trial, cross-examine the court expert on a report;
- viii) where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court;
- ix) the remuneration of a court expert shall be fixed by the judge and shall include a fee for the report and a proper sum for each day that the court expert is required to be present.
- x) where a court expert is appointed on the application of a party, the liability of the parties for the payment of the court expert's remuneration shall be determined by the judge;

xi) when an application by any party for the appointment of a court expert is opposed, the judge may, as a condition of making the appointment, require the party applying for the appointment to give such security for remuneration of the court expert as may seem just; and

xii) where a court expert is appointed by a judge on his own motion, the remuneration of the court expert shall be paid out of funds provided by law;

DECISION Approved - February 12th - 1118 hours, subject to section 46 being amended to make it clear that the recommendation would apply only to civil proceedings.

(h) by a majority, that the power of a court to appoint an expert witness in a criminal case should be formalized and put into legislation;

DECISION Rejected - February 21st - 1119 hours.

(i) by a majority, that while the court's power to appoint an expert would exist before trial, the power would be for the purpose of trial only and not for the purpose of a preliminary hearing;

DECISION Rejected - February 21st - 1119 hours.

(j) by a majority, that the provision for the appointment of a court expert in a criminal case should state -

i) on the application of any party or upon his own motion, a judge may at any time, if he considers it necessary for a proper determination of the issues, appoint an expert who shall, if possible, be a person agreed upon by the parties;

ii) the judge shall give the court expert instructions regarding his duties and these instructions shall, if possible, be agreed upon by the parties;

iii) the court expert shall inform the judge and the parties in writing of his opinion, and may thereafter be called to testify by the judge or any party and be subject to cross-examination by each party;

- iv) where a court expert is appointed, any party may call one expert to give reply evidence on any question of fact or opinion reported on by the court expert, but no party may call more than one such witness without leave of the court; and
- v) the court expert is entitled to reasonable compensation in an amount to be determined by the judge, such compensation to be paid from funds provided by law;

DECISION Rejected - February 21st - 1119 hours.
The preceding three recommendations together imply that the court's power to appoint an expert witness in a criminal case should be left to the existing law, and that section 46 of the Draft Act should be amended accordingly.

- (k) by a majority, that section 7 of the Canada Evidence Act be retained and made applicable to any proceeding;

DECISION Approved - February 21st - 1124 hours, subject to clarification that the expert witnesses may be called at any time. This may be done by adding to the section "and which it may do at any stage of the proceedings".

- (l) by a majority, that the provision should apply to a party's whole case rather than to each issue; and

DECISION Approved - February 21st - 1129 hours.

- (m) by a majority, that the number of experts who can be called by a party without leave should be increased from 5 to 7.

DECISION Approved - February 21st - 1129 hours.

CHAPTER 9

NON EXPERT OPINION EVIDENCE

9.8

Recommendations

(a) by a majority, that a provision regulating the admissibility of lay opinion evidence should be enacted;

DECISION Approved - February 12th - 1138 hours.

(b) by a majority, that section 67 of the proposed Canada Evidence Code be adopted, to provide that a witness other than one testifying as an expert may not give an opinion or drawn in inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue; and

DECISION Rejected - February 12th - 1138 hours, Ontario would substitute section 14 of the Draft O.L.R.C. Act which reads "Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding."

(c) unanimously, that section 8 of the Canada Evidence Act be retained to permit comparison of handwriting.

DECISION Approved - February 12th - 1138 hours.

CHAPTER 10

HEARSAY

10.25

Recommendations

(a) by a majority, that apart from express recommendation to the contrary the rules governing the reception of hearsay evidence be put into legislation;

DECISION Approved - February 12th - 1140 hours.

(b) unanimously, that "hearsay" be defined to mean a statement by a person other than one made while testifying as a witness at the proceeding that is offered in evidence to provide the truth of the matter asserted;

DECISION Rejected - February 12th - 1500 hours. Ontario prefers the provisions of the Law Reform Commission of Canada Draft Evidence Code section 27(2)(a) which reads "hearsay means a statement, other than one made by a person while testifying at a proceeding, that is offered in evidence to prove the truth of the statement".

(c) unanimously, that for the purpose of hearsay,

- i) "statement" be defined to mean an oral or a written assertion including non-verbal conduct intended as an assertion,
- ii) there be no requirement that the statement be "made to a witness called to give evidence," and
- iii) there be no legislative clarification of the effect of "a protest, greeting or verbal utterance" as stating any fact which the utterance implies;

DECISION Approved - February 12th - 1502 hours.

(d) unanimously, that the general rule excluding hearsay evidence be retained;

DECISION Approved - February 12th - 1328 hours.

(e) unanimously, that the general rule be qualified by particular admissible exceptions;

DECISION Approved - February 12th - 1330 hours.

(f) unanimously, that a distinction be drawn between those exceptions to the rule which arise because the testimony of the original declarant is unavailable and those exceptions which are warranted irrespective of the availability of his testimony;

DECISION Approved - February 12th - 1331 hours.

(g) unanimously, that it is not necessary to legislate the order in which the evidence should be received where hearsay evidence is admissible and the testimony of the declarant is also available;

DECISION Approved - February 12th - 1331 hours.

(h) unanimously, that both in civil and criminal proceedings where the testimony of the declarant is not available,

i) hearsay evidence of his statement not be admissible unless the statement would have been admissible if the declarant had testified, and

ii) where the testimony of the declarant is not available because of the wrong-doing of the proponent of the statement, hearsay evidence not be admissible;

DECISION Approved - February 12th - 1335 hours.

(i) where the testimony of the declarant is unavailable in a civil proceeding,

i) unanimously, that first-hand hearsay evidence be admissible;

ii) that the testimony of the declarant be considered to be unavailable in the following circumstances -

(A) unanimously, where the declarant is dead,

(B) by a majority, where the declarant is unfit by reason of his bodily or mental condition to testify as a witness,

(C) unanimously, where the declarant is beyond the jurisdiction of the court and the proponent of the hearsay statement has exhausted court processes to bring him before the court to testify and to obtain his testimony by examination out of the jurisdiction,

(D) by a majority, where the declarant cannot with reasonable diligence be identified,

- (E) by a majority, where the declarant cannot with reasonable diligence be found,
- (F) by a majority, where the declarant persistently refuses to obey a court order to take the oath or to affirm, subject to the discretion of the judge to reject the hearsay statement, and
- (G) by a majority, where having been sworn the declarant persistently refuses to obey a court order to testify, subject to the discretion of the judge to reject the hearsay statement;

iii) that the testimony of the declarant not be considered to be unavailable in the following circumstances -

- (A) by a majority, where the declarant testifies to lack of memory of the subject matter of the statement notwithstanding that he recalls having made a statement, or that the court declares him to be a hostile witness, and
- (B) by a majority, where the requirement that the declarant testify would cause undue delay, expense or other trial inconvenience;

iv) by a majority, that nothing in the hearsay section be taken to make admissible any evidence that would be inadmissible on any ground of privilege;

DECISION Approved - February 12th - 1416 hours, subject to addition of a new recommendation (H) that would adopt the Law Reform Commission of Canada's Draft Evidence Code section 29(2)(e) which defines "unavailable as a witness" as including situations where a person who made a statement is "absent from the proceeding and the importance of the issue or the added reliability of his testimony in court does not justify the expense or the inconvenience of procuring his

attendance or deposition" subject to a proviso that first having made that determination, the court may on the application of the opposing party order the attendance of the witness for cross-examination at the expense of that party. This recommendation would also modify recommendation (i)(iii)(B) which is to be read as subject to new recommendation (H).

(j) unanimously, that where the testimony of the declarant is unavailable in a criminal proceeding, hearsay evidence be received only when the test of reliability provided by a specific exception is met;

DECISION Approved - February 12th - 1416 hours.

(k) unanimously, that it is not necessary to legislate directions to the court for the determination of the fact that the declarant's testimony is unavailable;

DECISION Approved - February 12th - 1420 hours.

(l) unanimously, that the fact that the declarant is a witness or available to be called not form the basis for a hearsay exception;

DECISION Approved - February 12th - 1426 hours.

(m) unanimously, that the court continue to have the power to create new principled exceptions to the Rule against Hearsay where the circumstances sufficiently guarantee the trustworthiness of the statement;

DECISION Approved - February 12th - 1428 hours, with the addition of the words "and Parliament" after court.

(n) unanimously, that the court not have a special discretion to exclude otherwise admissible hearsay by reason of its prejudicial effect or for the purpose of expediting the trial process;

DECISION Approved - February 12th - 1432 hours.

(o) that otherwise inadmissible hearsay evidence be admissible,

i) unanimously, in a civil proceeding where the parties so agree;

ii) by a majority, in a criminal proceeding where the parties so agree;

DECISION Approved - February 12th - 1440 hours.

(p) by a majority, in both civil and criminal proceedings that the reception of hearsay evidence pursuant to (o) be subject to the consent of the judge;

DECISION Approved - February 12th - 1441 hours.

(q) by a majority, that legislation stipulate that the hearsay rules of inadmissibility apply to all stages of questioning at trial, whether the statement is tendered in chief, in cross-examination, in re-examination or otherwise;

DECISION Approved - February 12th - 1445 hours.

(r) by a majority, that the court not be told what to consider in determining the admissibility of hearsay evidence;

DECISION Approved - February 12th - 1446 hours.

(s) by a majority, that there be no provision to permit the court to admit contemporaneous or other statements by the same declarant for the purpose of qualifying or explaining admissible hearsay;

DECISION Approved - February 12th - 1447 hours.

(t) unanimously, that there be no provision to permit the court to admit contemporaneous statements of other declarants for the purpose of completing the evidentiary picture;

DECISION Approved - February 12th - 1448 hours, subject to addition of word "hearsay" after "contemporaneous".

(u) unanimously, that evidence that would have been admissible had the declarant been called as a witness be admissible in his absence for the purpose of attacking or supporting his credibility;

DECISION Approved - February 12th - 1448 hours,

(v) unanimously, that where hearsay evidence of a statement is introduced in evidence and the declarant is available the opposing party be able to call him as a witness and, with leave of the court, to cross-examine him on the statement;

DECISION Approved - February 12th - 1448 hours.

(w) unanimously, that legislation not specify factors for the court to consider in assigning weight to hearsay evidence;

DECISION Approved - February 12th - 1449 hours.

(x) unanimously, in light of the recommendation of the Task Force on corroboration that legislation on the corroborative use of hearsay evidence is neither necessary nor desirable;

DECISION Approved - February 12th - 1449 hours.

(y) unanimously, that the law relating to the admissibility of multiple hearsay be left to evolve in the courts;

DECISION Approved - February 12th - 1450 hours.

(z) unanimously, that in civil proceedings any requirement to give notice of the intention to introduce hearsay evidence be left to the rules of court in each jurisdiction;

DECISION Approved - February 12th - 1452 hours.

(aa) unanimously, that in criminal proceedings there be no notice requirement regarding the introduction of hearsay evidence on either the Crown or the defence;

DECISION Approved - February 12th - 1451 hours.

(ab) unanimously, that the same rules regarding hearsay apply whether the trial is by judge and jury or by judge alone;

DECISION Approved - February 12th - 1452 hours.

(ac) by a majority, that discretion not be granted to the judge to withhold a written hearsay statement from the jury out of concern that the jury will accord it undue weight;

DECISION Approved - February 12th - 1453 hours.

(ad) unanimously, that no special exception from the Rule against Hearsay be created for foundation facts tendered by an expert witness; and

DECISION Approved - February 12th - 1454 hours.

(ae) by a majority, that the hearsay provisions applicable to criminal proceedings also apply to proceedings with respect to provincial offences.

DECISION Approved - February 12th - 1455 hours.

CHAPTER 11

EXCEPTIONS TO HEARSAY RULE

11.5

Recommendations

(a) unanimously, that where the declarant or his testimony is unavailable there be a general exception to the Hearsay Rule in civil proceedings permitting the reception of first-hand hearsay;

DECISION Approved - February 12th - 1503 hours.

(b) unanimously, that in criminal proceedings there be no general exception to the Hearsay Rule permitting the reception of first-hand hearsay, but that the existing exceptions, namely, dying declarations, declarations against interest, declarations in the course of duty, declarations concerning pedigree, declarations of testators as to their wills, and former testimony, be retained with some amendments;

DECISION Approved - February 12th - 1504 hours, subject to other exceptions or quasi-exceptions in the criminal evidence field.

(c) unanimously, that for purposes of the exceptions to the Hearsay Rule listed in (b) "unavailable", unless otherwise specified, means that the declarant is dead or too ill to testify;

DECISION Approved - February 12th - 1518 hours, subject to amendment of section 57 to conform to section 643 of the Criminal Code which is worded in terms of the declarant being "dead" or "so ill that he is unable to travel or testify"; subject also to the question why there is no additional provision to cover a person who "has since become and is insane" as set out in section 643?

(d) by a majority, that a dying declaration be receivable in evidence only in relation to a charge of murder, attempted murder, manslaughter, criminal negligence causing death and any other charge coupled with one of the enumerated principal charges that arises out of the same transaction;

DECISION Approved - February 12th - 1518 hours.

(e) unanimously, that a declaration against interest be receivable in evidence if the following conditions are met--

- i) the declaration is one of fact of which the declarant had peculiar knowledge,
- ii) such fact was to his immediate prejudice at the time he stated it,
- iii) the declarant knew that the fact was against his interest when he made the declaration, and
- iv) the interest to which the declaration was adverse was a pecuniary, proprietary or penal one;

DECISION Approved - February 24th - 1030 hours, subject to the following amendments. In sub-clause (ii) reword to read "such declaration, viewed in its entirety, was to his immediate prejudice at the time he made it". Add an additional sub-clause (v) reading "provided that with respect to an alleged declaration against penal interest, the court may exclude such evidence in the event that

- i) there are no other circumstances connecting or tending to connect the declarant with the crime; or
- ii) there are circumstances connecting or tending to connect an accused with the making or substance of the declaration".

(f) unanimously, that in relation to declarations against interest "unavailable" include beyond the court's process,

DECISION Rejected - February 24th - 1044 hours. And thus Section 59 is to be amended by deleting "or who is in a jurisdiction beyond the processes of the court".

unanimously, that the declaration be receivable as evidence of collateral facts as well as facts against the interest of the declarant;

DECISION Approved - February 24th - 1044 hours.

(g) unanimously, that a declaration made in the course of duty be receivable in evidence if the following conditions are met--

- i) the declarant had a duty to record or report his acts,
- ii) the declaration was made roughly contemporaneously with the act or event recorded, and
- iii) the declaration was made ante litem motam;

DECISION Approved - February 24th - 1102 hours, subject to amendments. Subsection (iii) to read "the declaration was made without a motive to misrepresent". New subsection (iv) "the declaration was not made in anticipation of imminent litigation, provided that notes made by a police officer performing a public duty shall not be excluded on this ground alone".

(h) unanimously, that in relation to declarations made in the course of duty, the declaration also be receivable as evidence of collateral facts;

DECISION Approved - February 24th - 1105 hours.

(i) unanimously, that a declaration concerning family history (pedigree) be receivable in evidence if the following conditions are met--

- i) the declaration relates to a question of pedigree,

ii) it is established by evidence from a source other than the declarant himself that the declarant is a member of the family to which it is sought to relate the person whose status is in issue,

iii) the declaration was made ante litem motam;

DECISION Approved - February 24th - 1106 hours, subject to amendment of subsection (iii) to read "the declaration was made before the dispute in which it is tendered has arisen".

(j) unanimously, that a pre- or post-testamentary declaration by a testator as to the contents of his will or a post-testamentary declaration as to the execution, alteration or revocation of his will be receivable in evidence;

DECISION Approved - February 24th - 1107 hours.

(k) unanimously, that the exception to the Hearsay Rule found in section 643 of the Criminal Code be expanded to include cases where the declarant or his testimony is unavailable because the declarant

i) cannot be found after the exercise of due diligence or

DECISION Approved - February 24th - 1117 hours.

ii) testifies to a lack of memory on the subject, but in the latter case the trial judge have the discretion to require the examiner to attempt to refresh the declarant's memory as a condition of adducing the previous testimony;

DECISION Approved - March 16th - 1638 hours, and see also chapters 23 and 24.

(l) unanimously, that the following types of declarations be receivable in evidence in both civil and criminal proceedings regardless of the availability of the declarant or his testimony--

i) marriage, baptismal and similar certificates,

- ii) declarations in family records (such as a family bible) concerning facts relating to family matters,
- iii) reputation as to marriage,
- iv) reputation as to legitimacy or illegitimacy,
- v) declarations as to public or general rights, where the declaration was made ante litem motam and it can be established that the declarant had competent knowledge of the right;
- vi) declarations contained in a document produced from proper custody that was executed twenty years or more before the time it is adduced in evidence, and
- vii) such other declarations as are declared admissible by virtue of some other part of this report without reference to the availability of the declarant.

DECISION Approved - February 24th - 1125
hours, with the exception of
subsection (vii) which was rejected.

CHAPTER 12 INFORMAL ADMISSIONS

12.5 Recommendations

(a) unanimously, that there be no change in the law relating to admissions made personally by a party to an action (either civil or criminal), except in relation to admissions made in a representative capacity where it recommends that it no longer be necessary to prove as preliminary facts that the statement was made during a period when the party was a representative and in a representative capacity;

DECISION Approved - February 26th - 1345 hours, subject to addition of new sub-clause to replace sections 62 reading "any statement is admissible against a party to the proceeding if he expressly adopted it or if, in the circumstances, it is reasonable to infer that he adopted it".

(b) unanimously, that authorized admissions be admissible against the authorizing party no matter who receives the admission;

DECISION Approved - February 26th - 1346 hours.

(c) unanimously, that in civil proceedings or in summary conviction proceedings any statement made by an agent or employee of a party to the proceeding during the existence of the agency or employment is admissible against that party if the statement concerned a matter within the scope of the agency or employment;

DECISION Approved - February 26th - 1421 hours, with respect to civil proceedings. Decision reserved on application to criminal proceedings. In the phrase "admissible against that party" amend to read "admissible against the party".

(d) by a majority, that in proceedings by way of indictment statements of an agent or servant only be admissible against the party if made by an agent or servant exercising a managerial function, and then only with respect to his area of managerial authority;

DECISION Reserved.

(e) unanimously, that apart from privity in law (admissions in a representative capacity) statements by privies not be treated as admissions in either civil or criminal cases;

DECISION Approved - February 26th - 1422 hours, subject to the following changes after the word "privies" add "by virtue of that reason alone" so that the recommendation will read "that apart from privity in law (admissions in a representative capacity) statements by privies by virtue of that reason alone not be treated as admissions in either civil or criminal cases".

(f) by a majority, that in civil and criminal cases a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy be treated as an admission of the party;

DECISION Approved - February 26th - 1434 hours, subject to the following amendments. Major recommendation amended to read "that in civil and criminal cases a statement by a co-conspirator of a party which party has been established prima facie by other admissible evidence himself to be a party to the conspiracy, in furtherance of the conspiracy be treated as an admission of the party".

Second amendment a new subsection to cover section 21(2) of the Criminal Code, such amendment to be framed along the lines of section 30(d) of the Federal Law Reform Commission's proposed evidence code. The amendment would thus read "that a statement by a person engaged with the party in an unlawful purpose made in furtherance of their common purpose shall not be excluded by the Hearsay Rule when offered against a party".

(g) by a majority, that the common law position regarding the treatment of evidence of remedial measures taken subsequent to an accident be retained in both civil and criminal cases;

DECISION Approved - February 26th - 1444 hours.

(h) unanimously, that the common law position regarding the treatment of evidence of the existence of liability insurance, the payment of medical and like expenses occasioned by an injury, and offers to compromise a disputed claim be retained in both civil and criminal cases; and

DECISION Approved - February 26th - 1444 hours.

(i) unanimously, that recommendations (g) and (h) not be enacted as part of the Uniform Evidence Act but be left to common law development.

DECISION Approved - February 26th - 1445 hours.

CHAPTER 13 CONFESIONS

13.14 Recommendations

(a) unanimously, that the Confessions Rule be retained;

DECISION Approved - February 24th - 1126 hours.

(b) unanimously, that the Rule apply only to statements made by the accused to a person in authority;

DECISION Approved - February 24th - 1126 hours.

(c) by a majority, that person in authority be defined as "someone having authority over the accused in relation to a criminal proceeding";

DECISION Approved - February 24th - 1126 hours.

(d) by a majority, that a person not in authority be deemed to be a person in authority if the accused reasonably could have concluded at the time he made his statement that he was dealing with a person who had authority over him in relation to a criminal proceeding;

DECISION Approved - February 24th - 1127 hours.

(e) by a majority, that the Confessions Rule not apply where the accused was unaware that he was dealing with a person in authority when he gave his statement;

DECISION Approved - February 24th - 1127 hours.

(f) unanimously, that the Confessions Rule apply to both inculpatory and exculpatory statements;

DECISION Approved - February 24th - 1127 hours.

(g) by a majority, that the Confessions Rule apply to statements of the accused that form a part of the res gestae;

DECISION Rejected - February 24th - 1127 hours.

(h) unanimously, that voluntariness continue to be the test of admissibility of a statement covered by the Rule;

DECISION Approved - February 24th - 1448 hours.

(i) by a majority, that the definition of "voluntary" be that enunciated in Ibrahim v. R., namely, not obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority;

DECISION Approved - February 24th - 1449 hours.

(j) unanimously, that oppression not be treated as a separate concept for purposes of the Confessions Rule, but rather as one of the factors to be taken into account in determining whether the accused gave the statement voluntarily;

DECISION Approved - February 24th - 1449 hours.

(k) by a majority, that if the accused alleges that the statement cannot be considered to be his because of his mental or physical condition at the time, the legal burden of establishing this be on him;

DECISION Approved - February 24th - 1459 hours, subject to the phrase "legal burden" being changed to "onus" and that section 69 is amended to change the word "preponderance" to "balance".

(l) by a majority, that statutory compulsion not be considered as a factor in determining whether a statement was voluntary, but that a voir dire be held in any event to determine whether the statement may have been rendered involuntary by factors separate and apart from the statutory compulsion;

DECISION Rejected - February 24th - 1326 hours. Ontario would prefer "that where a statement is made under statutory compulsion and where the accused is informed of this fact, no voir dire shall be held; in all other cases a voir dire shall be held to determine whether a statement was voluntary".

(m) unanimously, that the question of recognition of statutory immunity provisions between jurisdictions be studied;

DECISION Rejected - February 24th - 1327 hours. Preferred Ontario position that "where a statement is made under statutory compulsion and an immunity is granted by the same provision, the statement shall not be admissible in evidence to the extent of the immunity".

(n) unanimously, that statements given in a judicial proceeding not be considered as falling within the Confessions Rule;

DECISION Approved - February 24th - 1337 hours.

(o) unanimously, that answers given by the accused in a voir dire in the proceeding not be usable by the Crown in its case in chief;

DECISION Formal split vote 1-1-1 - February 26th - 1025 hours.

(p) by a majority, that recommendation (o) represents the present law and does not need to be legislated;

DECISION Rejected - February 26th - 1035 hours, in view of difference of opinion on (o).

(q) by a majority, that the Crown be precluded from asking the accused during the voir dire on the admissibility of his statement whether the statement is true;

DECISION Rejected - February 26th - 1059 hours.

(r) by a majority, that the judge may look at or hear the contents of the statement in determining its admissibility;

DECISION Approved - February 26th - 1059 hours.

(s) unanimously, that the Crown be allowed to adduce statements of the accused either during its case in chief or during cross-examination of the accused;

DECISION Approved - February 26th - 1059 hours, subject to addition of the words "provided that the Crown is not entitled to split its case".

(t) unanimously, that if the Crown wishes to introduce a statement of the accused for the first time during cross-examination

- i) it provide him with copies of all his statements that it may so use and notify him of their possible use, and
- ii) establish on a voir dire, either during its case in chief or during cross-examination, that the statement was voluntary;

DECISION Approved - February 26th - 1138 hours, subject to deletion of part (i) so that the statement would read "that if the Crown wishes to introduce a statement of the accused to a person in authority for the first time during cross-examination, it establish on a voir dire, either during its case in chief or during cross-examination that the statement was voluntary".

(u) by a majority, that statements admitted under recommendation (t) be received for all purposes, i.e. credibility and truth of their contents;

DECISION Approved - February 26th - 1139 hours.

(v) unanimously, that the Crown continue to have the burden of proving at the preliminary inquiry that a statement of the accused to a person in authority was made voluntarily;

DECISION Approved - February 26th - 1149 hours.

(w) unanimously, that if the Crown establishes the admissibility of the accused's statement on a voir dire in a preliminary inquiry, Crown evidence given on the voir dire be read in as part of the Crown's case in chief at the preliminary inquiry without the necessity of repeating it;

DECISION Approved - February 26th - 1150 hours, subject to alteration of words "read in as" to "deemed to be".

(x) unanimously, that the Confessions Rule not apply to hearings relating to judicial interim release of the accused;

DECISION Approved - February 26th - 1150 hours.

(y) by a majority, that the quantum of proof of voluntariness in a voir dire at trial be proof beyond reasonable doubt;

DECISION Rejected - February 26th - 1151 hours, in favour of a statement that the quantum of proof of voluntariness in a voir dire at trial be that the judge is reasonably satisfied that the statement is voluntary.

(z) unanimously, that the quantum of proof of voluntariness in a voir dire in a preliminary inquiry be on a preponderance of probabilities;

DECISION Approved - February 26th - 1150 hours, subject to rewording so that recommendation will read "that the quantum of proof of voluntariness in a voir dire in a preliminary inquiry be that the judge is reasonably satisfied that there is evidence on which the trial judge could find that the statement is admissible".

(aa) unanimously, that the accused be able to waive proof of voluntariness;

DECISION Approved - February 26th - 1204 hours.

(ab) by a majority, that the answers given by the accused during a voir dire on the admissibility of his statement be usable by the Crown in cross-examination of the accused, but that the judge have the power to limit such cross-examination where it appears there is a substantial danger of the jury becoming aware of the existence of a statement that has been ruled inadmissible;

DECISION Approved - February 26th - 1204 hours.

(ac) unanimously, that the law relating to the use that can be made of a statement of one accused by his co-accused be allowed to develop through the cases;

DECISION Approved - February 26th - 1205 hours.

(ad) by a majority, that where an inadmissible statement of the accused is confirmed in part by the finding of objective fact evidence, the part of the statement so confirmed be admissible in evidence;

DECISION Approved - February 26th - 1206 hours.

(ae) by a majority, that in giving the part of the statement to the jury under recommendation (ad), the judge give the actual words used rather than a paraphrase;

DECISION Approved - February 26th - 1206 hours.

(af) by a majority, that the confirmation be possible by objective fact evidence found either before or after the accused made his statement to a person in authority;

DECISION Approved - February 26th - 1206 hours.

(ag) by a majority, that the recommendations in relation to confirmation by finding of objective facts be put in legislative form;

DECISION Approved - February 26th - 1206 hours.

(ah) unanimously, that there be no legislative rules regarding editing of statements by the judge; and

DECISION Approved - February 26th - 1206 hours.

(ai) unanimously, that directions to the jury in relation to voluntariness as it affects weight and the question whether the accused actually made the statement continue in their present form and not be legislated.

DECISION Approved - February 26th - 1206 hours.

CHAPTER 14 RES GESTAE

14.5 Recommendations

(a) by a majority, that the proposed Uniform Evidence Act omit the term res gestae;

DECISION Approved - March 2nd - 1039 hours.

(b) unanimously, that instead of the term res gestae, the Act set out the following specific exceptions to the Hearsay Rule, none of which require for admissibility the unavailability of the declarant's testimony -

- i) a statement of contemporaneous physical condition, including the duration of the condition, but not a statement of the cause of the condition,
- ii) a statement of contemporaneous state of mind or emotion, but not a statement made after the event in issue,
- iii) a statement made in direct reaction to a startling event perceived or apprehended by the declarant be admissible,
- iv) a verbal act or a statement describing or explaining an act or event and made contemporaneously with it;

and by a majority, that a statement made by an accused be inadmissible under recommendation (b) (iv) unless the accused testifies, and then only during the case for the defence rather than by cross-examination of a Crown witness.

DECISION Approved - March 2nd - 1042 hours, subject to addition of the adjective "spontaneous" before statement in (b) (iii), and addition of adverb "spontaneously and" before "contemporaneously" in (b) (iv). Secondly, that the closing paragraph should be amended to read "by a majority, that a statement made by an accused be inadmissible under recommendation (b) (i), (ii) and (iv) at the instance of the accused unless the accused testifies, and then only during the case for the defence rather than by cross-examination of the Crown witness".

CHAPTER 15 HOLLINGTON V. HEWTHORN

15.14 Recommendations

(a) unanimously, that the Rule in Hollington v. Hewthorn be abolished so as to render evidence of a criminal conviction admissible to show the guilt of the convicted person when it is relevant to an issue in a civil proceeding, generally as provided in sections 28.1-28.3 of the Uniform Evidence Act;

DECISION Split vote 2-1 - March 2nd - 1131 hours, with the following amendments to the recommendation to read "that the Rule in Hollington v. Hewthorn be abolished so as to render evidence of a criminal conviction or finding of guilt admissible as evidence of the guilt of the convicted person when it is relevant to an issue in a civil proceeding, generally as provided in sections 28.1-28.3 of the Uniform Evidence Act".

(b) by a majority, that the introduction of a conviction not shift the burden of proving whether the convicted person committed the offence, but that the conviction be given such weight as the trier of fact considers appropriate in the circumstances;

DECISION Approved - March 2nd - 1132 hours, subject to being reworded to read "that the evidence of the conviction or finding of guilt be given such weight as the trier of fact considers appropriate in the circumstances".

(c) unanimously, that in a defamation proceeding, a conviction be conclusive evidence of guilt, and that evidence be inadmissible to attack the reliability of the conviction;

DECISION Approved - March 2nd - 1129 hours.

(d) by a majority, that a conviction for a federal, provincial or municipal offence recorded by a Canadian court or by a court martial pursuant to the National Defence Act conducted anywhere, be admissible in evidence in a subsequent civil proceeding;

DECISION Split vote 2-1 - March 2nd - 1144 hours, with the following amendments after conviction add "or finding of guilt", after Canadian court add comma and after National Defence Act delete comma.

(e) unanimously, that a conviction based on a guilty plea, an absolute or conditional discharge (based on a finding of guilt) and a conviction which has been pardoned except by a free pardon, may be proved;

DECISION Approved - March 2nd - 1151 hours, subject to addition of the words "or finding of guilt" after "conviction" on both occasions when the word "conviction" is used.

(f) by a majority, that no provision be made for the admissibility of an acquittal as evidence of innocence;

DECISION Split vote 2-1 - March 2nd - 1152 hours.

(g) unanimously, that documentary evidence admissible to prove the fact of conviction and the issues on which it was based includes a certificate of conviction, and a copy of the information or indictment;

DECISION Split vote 2-1 - March 2nd - 1153 hours, with the text amended to read "that documentary evidence admissible to prove the conviction or finding of guilt includes a certificate of conviction, and/or a copy of the information or indictment with the conviction or finding of guilt endorsed thereon".

(h) by a majority, that a conviction be admissible only if it is not subject to appeal, or to further appeal;

DECISION Approved - March 2nd - 1154 hours.

(i) by a majority, that in a criminal proceeding in respect of a charge of possession of stolen property or stolen mail, a conviction of a person (other than the accused) of theft be admissible as evidence that the goods were stolen; and

DECISION Approved - March 2nd - 1155 hours.

(j) by a majority, that in a criminal proceeding in respect of a charge of being an accessory after the fact to an offence, a conviction of the principal party be admissible as evidence of the commission of the principal offence by the convicted person.

DECISION Approved - March 2nd - 1155 hours, with an additional recommendation (k) to be added along the lines of recommendation 4 on page 102 of the Ontario Law Reform Commission Report which reads "where in a proceeding under the Divorce Act of Canada a co-respondent has been found to have committed adultery, the judgment of the court should be proved, in the absence of evidence to the contrary, of the co-respondent's adultery in any subsequent proceedings.

CHAPTER 16

ILLEGALLY OR IMPROPERLY OBTAINED
EVIDENCE

16.4

Recommendation

A majority of the Task Force recommends that legislation not be enacted to authorize the exclusion of evidence obtained illegally, improperly or by means likely to bring the administration of justice into disrepute.

DECISION Deferred - March 2nd - 1410 hours.

CHAPTER 17

THE OATH

17.3

Recommendations

- (a) by a majority, that any court and any judge, as well as any person authorized by law or by the consent of the parties to hear and receive evidence, may require of any witness legally summoned to give evidence before such court, judge or person that he take an oath or solemn affirmation;

DECISION Approved - March 2nd - 1429 hours.

- (b) by a majority, that the court or the judge, the officer or other person authorized to administer an oath and solemn affirmation must, before so doing, inform a witness of his right to choose an oath or affirmation and request that the witness indicate such choice, but failure to comply with this requirement would not invalidate a document or constitute a defence to a criminal charge.

DECISION Rejected - March 2nd - 1429 hours.

CHAPTER 18

COMPETENCY OF CHILDREN

18.3

Recommendations

(a) by a majority, that provision be retained for receiving children's unsworn evidence;

DECISION Approved - March 2nd - 1430 hours.

(b) by a majority, that subsections 3(2) and (3) of the Draft Ontario Evidence Act be adopted to define the capacity of children to testify upon oath (or affirmation) or unsworn.

DECISION Approved - March 2nd - 1435 hours, subject to amendment of sections 3(2) and (3) to reflect the retention of the oath and affirmation. Further, it was noted that this recommendation was to be read subject to recommendation 27.4 (b)(ii).

CHAPTER 19

MENTAL INCAPACITY

19.3

Recommendation

A majority of the Task Force recommends that those who do not qualify as children of tender years and who are incompetent to testify under oath or affirmation because of mental incapacity be allowed to testify if they meet the requirements for testifying without oath or affirmation.

DECISION Approved - March 2nd - 1525 hours, subject to rewording of section 16(1) of the Canada Evidence Act to read "in any legal proceeding, (a) where a child of tender years is offered as a witness, or (b) where it is alleged that a potential adult witness is not a competent witness and the court, on the application of the party so alleging, is satisfied, on evidence adduced by the party so alleging, that there is a real issue as to the competence of the witness, as of the

trial, and, such person does not, in the opinion of the court, understand the nature and consequences of giving false evidence, the evidence of such person may be received though not given upon oath or affirmation if, in the opinion of the judge, justice or other presiding officer, as the case may be, the person is possessed of sufficient intelligence to justify the reception of his evidence and understands that he should tell the truth, and where the judge, justice, or other presiding officer so finds, he shall commit the person to give evidence upon stating: "I promise to tell the truth".

CHAPTER 20

SPOUSAL COMPETENCY

20.9

Recommendations

(a) by a majority, that one spouse be competent to give evidence against the other on behalf of the Crown;

DECISION Split vote 2-1 - March 12 - 1446 hours.

(b) by a majority, that the definition of "spouse" be limited to a legal marriage;

DECISION Approved - March 12 - 1447 hours.

(c) by a majority, that, except where both spouses are jointly charged, a spouse be compellable at the instance of the accused spouse;

DECISION Split vote to reject recommendation 2-1 - March 12 - 1456 hours and replace by recommendation that "except where both spouses are jointly charged, a spouse be competent to give evidence at the instance of the accused spouse".

(d) unanimously, that a spouse of an accused be competent but not compellable to give evidence for a person tried jointly with the accused, in all cases;

DECISION Split vote 2-1 - March 12 - 1514 hours.

(e) unanimously, that a spouse of an accused be competent and compellable for the Crown in proceedings pursuant to any of the following provisions and/or offences:

- (i) section 33 or 34 of the Juvenile Delinquents Act, sections 143 to 146, 148 to 157, 166 to 168, 195, 197, 200, 216, 218 to 221, 226, 227, 248 to 250, 255 to 257, 289, paragraphs 423(1)(c) and 688(b) or an attempt to commit an offence under section 146 or 155 of the Criminal Code;
- (ii) crimes against the accused's spouse or his or her property;
- (iii) crimes against a child under the age of 14 years;
- (iv) high treason or treason punishable by a maximum term of life.

DECISION Approved - March 12 - 1517 hours.
Subject to addition of section 222 in subsection 1 and deletion of subsection (b) following section 688. In addition, Ontario notes that the reference to dispositions under 688 is not carried forward into section 95 of the draft bill.

(f) unanimously, that the present rules of spousal competency and compellability in civil actions be retained;

DECISION Approved - March 12 - 1518 hours.

(g) unanimously, that the proposals set out in sections 20.2 to 20.5 of this report should apply to provincial prosecutions, i.e. the same rules of spousal competency and compellability should apply to criminal and provincial offences;

DECISION Approved - March 12 - 1524 hours.

(h) unanimously, that there be an exception to (b) for the enactment of rules of spousal compellability for prosecutions governed by Acts other than a Provincial Evidence Act;

DECISION Approved - March 12 - 1525 hours.
Subject to addition of adjective "provincial" before "prosecutions".

- (i) by a majority, that there be further exceptions for
 - (i) a provincial offence against the spouse or against his or her property, and
 - (ii) a provincial offence against a child under the age of 14 years.

DECISION Approved - March 12 - 1525 hours.

CHAPTER 21

MANNER OF QUESTIONING WITNESSES

21.12

Recommendations

- (a) generally, leading questions are prohibited on examination-in-chief or re-examination -
 - i) a "leading question" is defined as a question that suggests the answer the examining party desires;
 - ii) leading questions may be asked as to introductory or undisputed matters, authentication of exhibits or identification of persons, to assist a witness who has difficulty understanding or recollecting the matter on which he is being questioned, or in questioning a hostile or reluctant witness, or in rebuttal;

DECISION Rejected - March 3rd - 0958 hours, and the following substituted:

- (a) In examination-in-chief or re-examination:
 - i) A prohibited leading question is one which assumes a fact in issue not previously deposed to by the witness or one which suggests an answer on a fact in issue.
 - ii) A question is not leading and therefore not prohibited merely because:
 - a) it directs a witness' attention to a subject matter as long as it does not suggest an answer within that subject matter, or

- b) it is a hypothetical question as long as it does not suggest an answer on a fact in issue.
- iii) A question which suggests an answer on an introductory or undisputed matter is not prohibited.
- iv) The Court may permit leading questions:
 - a) with respect to the authentication of exhibits or identification of persons,
 - b) to assist a witness who has difficulty understanding or recollecting the matter on which he is being questioned,
 - c) in rebuttal.
- (b) a witness called by an opposing party may be cross-examined on matters relevant to any of the facts in issue and on facts substantially relevant to the credibility of the witness;

DECISION Approved - March 3rd - 1031 hours, subject to the following two new subsections being added to section 106.

Section 106(b) Where the party cross-examining a witness alleges or assumes a fact not then proved, counsel thereby undertakes to prove the facts alleged on the question.

Section 106(c) Where the party cross-examining a witness intends to impeach the testimony of the witness on relevant issues, he shall direct the witness' attention to such issues.

(c) in a criminal proceeding or a provincial prosecution, an accused person may not be cross-examined, for the purpose of impeaching his credibility, as to his bad character, including his antecedents, associations, mode of life and participation in crimes (other than convictions);

DECISION Approved - March 3rd - 1039 hours, subject to the rewording of the recommendation as follows: "For the purpose of impeaching his credibility, an accused person may be cross-examined, in a criminal proceeding or a provincial prosecution as to his bad character, including his antecedents, associations, mode of life and participation in crimes (other than convictions), where it is directly relevant to prove the falsity of the accused evidence".

(d) without restricting the judge's right to comment on the evidence, where counsel cross-examines a favourable witness called by an opposing party, the judge may, in the absence of the jury, advise counsel that if he continues to ask leading questions, the answers thus received may be subject to comment concerning their weight;

DECISION Approved - March 3rd - 1039 hours.

(e) a party has the right to re-examine his own witness on new facts elicited on cross-examination or to explain or clarify his answers given on cross-examination, including an inconsistency between his testimony on examination-in-chief and cross-examination;

DECISION Approved - March 3rd - 1040 hours.

(f) subject to the power of the court in exceptional situations to exercise reasonable control over the presentation of evidence and the examination of witnesses so as to avoid needless consumption of time and to protect witnesses from harassment, the parties to a proceeding have the right and the responsibility to present the evidence and examine the witnesses;

DECISION Approved - March 3rd - 1041 hours, subject to deletion of words "in exceptional situations" and "the presentation of evidence and".

(g) the judge has the right to ask a witness a question which he deems useful and to recall a witness for that purpose;

DECISION Approved - March 3rd - 1053 hours.

(h) in a criminal proceeding or a provincial prosecution, exceptionally, the judge has the power to call a witness, and after the judge examines such a witness, a party has the right to cross-examine him; and

DECISION Split vote 1-1-1 - March 3rd - 1053 hours.

(i) in a civil proceeding, except where a statute provides otherwise, a judge shall not have the power to call a witness.

DECISION Split vote 1-1-1 - March 3rd - 1115 hours.

CHAPTER 22

EXCLUSION OF WITNESSES

22.5

Recommendations

(a) by a majority, that a judge have the power to exclude any witness, except

- (i) in a criminal proceeding or provincial prosecution, an accused person, or
- (ii) in a civil proceeding, unless a statute or rule of court otherwise provides, a party to the proceeding;

DECISION Approved - March 12th - 1421 hours.
Subject to rewording of recommendation to read "that a judge have the power to exclude any witness, except

- (i) subject to s.577 of the Criminal Code in a criminal proceeding or provincial prosecution, an accused person, or
- (ii) in a civil proceeding, a party to the proceeding, unless a statute or rule of court otherwise provides".

(b) by a majority, that disobedience of an order of exclusion, either with or without the connivance of the party calling the witness not be the basis for disqualification of the witness but may result in a judicial comment to the jury concerning the effect of disobedience on the weight of the witness' testimony; and

DECISION Approved - March 12 - 1422 hours.

(c) by a majority, that the judge may, at the request of a party, exempt any individual from an order of exclusion, if the judge is satisfied that the presence of the individual in court is necessary for the proper instruction of counsel or effective presentation of the party's case, and that the judge may impose conditions on such an exception.

DECISION Approved - March 12 - 1422 hours.
Ontario would add the following additional recommendation:

(d) If the accused calls evidence that confirms his own testimony (by alibi, for example) the accused should testify before such confirmatory evidence is given; and if he does not, his failure to do so may be the subject of adverse comment by the judge.

DECISION Approved - March 12th - 1424 hours.

CHAPTER 23 REFRESHING MEMORY

23.5 Recommendations

(a) unanimously, that a trial judge (i) may require a witness to attempt to revive his memory by examining any writing or thing, and (ii) before permitting a party to show such a writing or thing to a witness, may require the party to establish that it may tend to revive the witness's memory rather than lead him into mistake or falsehood;

DECISION Approved - March 3rd - 1138 hours.
Subject to deletion of part (ii) so that clause reads "that a trial judge may permit or require a witness to attempt to revive his memory by examining any writing or thing, without requiring the witness to exhaust his memory".

(b) unanimously, that a writing may be used to refresh a witness's memory even if he neither authored nor verified it (contemporaneously with the event or not);

DECISION Approved - March 3rd - 1154 hours.
Subject to rewording of recommendation to read "that a writing may not be used to refresh a witness's memory unless he either authored or verified it when his memory was sufficiently fresh to justify its consideration by the court, or unless it is a transcript of testimony given by the witness on a prior occasion when he was under oath and subject to cross-examination".

(c) unanimously, that an opposing party has a right to production of any writing or thing used to refresh the memory of a witness while testifying;

DECISION Approved - March 3rd - 1155 hours.

(d) by a majority, that where a witness uses a writing or thing, before testifying, to refresh his memory for the purpose of testifying, the judge may, in the interests of justice, order production of the writing or thing;

DECISION Approved - March 3rd - 1155 hours.

(e) unanimously, that the judge may examine, in camera, any writing or thing used to refresh a witness's memory, before ordering its production, and excise any unrelated portions thereof before presenting the remainder to the party requesting it;

DECISION Approved - March 3rd - 1326 hours.
Subject to replacement of word "excise" by "edit out".

(f) by a majority, that a writing used by a witness to revive his recollection should be inadmissible as evidence of the facts stated therein, unless it is a transcript of testimony given by the witness on a prior occasion when he was under oath and subject to cross-examination.

DECISION Approved - March 3rd - 1351 hours.
Subject to amendment of section to read "that a writing or thing used solely for the purpose of refreshing a witness's memory should be inadmissible as evidence of the facts stated therein".

Concerning Past Recollection Recorded, the Task Force recommends:

(a) unanimously, that the witness must have had personal knowledge of that event recorded;

DECISION Approved - March 3 - 1408 hours.

(b) unanimously, that the statement be in writing, reduced to writing or otherwise recorded by means of a reliable device;

DECISION Approved - March 3 - 1408 hours.

(c) unanimously, that the witness must have made or verified the record when his memory of the event recorded was fresh;

DECISION - Approved - March 3 - 1409 hours. Subject to addition of phrase "unless it is a transcript of testimony given by the witness on a prior occasion when he was under oath and subject to cross-examination".

(d) unanimously, that where practicable, the original record be introduced.

DECISION Approved - March 3 - 1410 hours.

(e) unanimously, that the witness must be unable to recall the event recorded;

DECISION Approved - March 3 - 1411 hours.

(f) unanimously, that the writing must accurately reflect the witness's knowledge of the event recorded when he made or verified the record;

DECISION Approved - March 3 - 1412 hours. Subject to addition of the phrase "or testified on the prior occasion".

(g) unanimously, that the record must be produced for inspection by the opposing party and for cross-examination of the witness;

DECISION Rejected - March 3 - 1412 hours. In view of the decision concerning paragraph (h).

(h) by a majority, that the record may be introduced as an exhibit at the request of any party;

DECISION Approved - March 3 - 1359 hours.
Subject to rewording of recommendation to read "that the record shall be introduced as an exhibit as evidence of the facts contained therein, subject to the credibility of the deponent".

(i) unanimously, that the judge may admit additional portions of a record which explain the portions admitted as past recollection recorded.

DECISION Approved - March 3 - 1413 hours.

CHAPTER 24 USE OF PREVIOUS STATEMENTS

24.11 Recommendations

1. Prior Consistent Statements

(a) unanimously, that where a declarant testifies at a proceeding concerning a statement, and the statement is one identifying a person after perceiving him, that statement should be admissible for all purposes;

DECISION Approved - March 3 - 1443 hours. With the additional recommendation that the words "and the witness is subject to cross-examination" in section 53 be deleted.

(b) unanimously, that the doctrine of recent complaint as a rule of evidence should be abolished, that a judge should not be required to give a direction to the jury as to the inference of lack of credibility that they may draw from the absence of a complaint, and that there should be no presumption as to consent in the absence of evidence of recent complaint;

DECISION Approved - March 3 - 1453 hours.

(c) unanimously, that the rule of evidence applicable only to sexual offences whereby evidence of recent complaint is admissible to bolster the victim's credibility be abolished;

DECISION Approved - March 3 - 1453 hours.

(d) unanimously, that evidence of the contents of a complaint be admissible only if it qualifies for admission under a rule of evidence such as excited utterance, to rebut an allegation of contrivance,



or on behalf of the defence as a previous inconsistent statement, and that evidence of the absence of a complaint be admissible only if it is admissible under a rule of evidence such as to impeach the complainant's credibility by an allegation of contrivance;

DECISION Approved - March 3 - 1454 hours.

(e) by a majority, that the right to rehabilitate a witness by a previous consistent statement, following an allegation of recent contrivance, only be available once the witness is on the stand;

DECISION Approved - March 3 - 1500 hours.

(f) by a majority, that the phrase "recent fabrication" be clarified to permit rehabilitation of a witness by a consistent statement if the witness has been impeached by an express or implied allegation of contrivance or by means of an inconsistent statement, regardless of whether the consistent statement preceded or followed the discrediting factor; and

DECISION Approved - March 3 - 1501 hours.

Subject to substitution of words
"inconsistent statement" for
"discrediting factor".

(g) by a majority, that a prior consistent statement which is admissible to rebut an allegation of contrivance or to rebut an inconsistent statement, given under oath and subject to cross-examination at the time it was made, be admissible not only to support a witness's credibility but also for the truth of what is asserted in it, in a civil or criminal proceeding.

DECISION Approved - March 3 - 1511 hours.

Subject to replacement of words "for
the truth of what is asserted in it" by
"as evidence of its contents".

2. Prior Inconsistent Statements

(a) by a majority, that a prior inconsistent statement; given under oath and subject to cross-examination at the time it was made, be admissible for all purposes in a civil or criminal proceeding;

DECISION Approved - March 3 - 1524 hours.
Subject to rewriting of recommendation
to read "that a prior inconsistent
statement be admissible as evidence of
its contents in a civil or criminal
proceeding".

(b) by a majority, that the statutory provisions governing the admissibility of a prior inconsistent statement to impeach the credibility of an opposing party's witness be revised and brought into one provision -

(i) that the revised provision commence with a phrase comparable to the following: "Upon cross-examination as to credibility, a witness may be asked as to his prior statement...";

DECISION Approved - March 3 - 1545 hours.
Subject to deletion of phrase "as to credibility".

(ii) that the word "statement" in the preceding recommendation comprise oral and written statements;

DECISION Approved - March 3 - 1545 hours.

(iii) that written statements (the phrase "in writing or reduced to writing" in subsection 10(1) of the Canada Evidence Act) be revised to include other forms of recording and transcripts prepared therefrom;

DECISION Approved - March 3 - 1545 hours.

(iv) that, before a witness may be cross-examined concerning a prior inconsistent statement, the cross-examiner must furnish him with enough information so that he reasonably knows what the circumstances were, or the occasion was, when he made the prior statement;

DECISION Approved - March 3 - 1545 hours.
Subject to inclusion after the phrase "what the circumstances were" of the words "including specifying whether orally, in writing, or reduced to writing".

(v) that, before other evidence is admissible to contradict a witness who does not admit making the alleged statement, the witness's attention must be drawn to the occasion on which he is alleged to have made the statement, and he must be asked whether he made it; if the statement is in writing, the witness's attention must further be drawn to the parts of the document that will be used for the purpose of contradicting him;

DECISION Approved - March 3 - 1545 hours.
Subject to deletion of phrase "if the statement is in writing" and replacement of word "document" by "statement" in the last line.

(vi) that, as the collateral facts rule requires, before other evidence of the prior statement is admissible, it must be relevant to a material issue in the proceeding; and

DECISION Approved - March 3 - 1545 hours.

(vii) that the judge's power to order production of a statement be retained;

DECISION Approved - March 3 - 1545 hours.

(c) by a majority, that the provisions governing the admissibility of a prior inconsistent statement to impeach the credibility of a party's own witness be revised along the lines of section 9 of the Canada Evidence Act, as follows -

(i) that the prohibition upon a party's impeachment of his own witness's credibility by general evidence of bad character be retained;

(ii) that the provision be corrected to allow, as a matter of right, a party to adduce other evidence to contradict a witness's testimony on the issues without establishing that the witness is adverse or obtaining leave of the court;

(iii) that a party be entitled, subject to the judge's discretion to prevent harassment of a witness or abuse of procedure, to cross-examine his own witness on a prior inconsistent statement that is relevant to a material issue, and if the witness does not admit it, to establish it by other evidence, without establishing that the witness is adverse or obtaining leave of the court;

(iv) that a party continue to be entitled to cross-examine a witness who is adverse or unwilling to testify, but that "adverse" should mean "hostile or opposed in interest", and that leave of the court should not be required;

- (v) that the prerequisite of leave of the court be replaced with a discretion in the judge to require the party to try to refresh the witness's memory before impeaching his credibility;
- (vi) that written statements (the phrase "in writing or reduced to writing" in subsection 9(2) of the Canada Evidence Act) be revised to include other forms of recording and transcripts prepared therefrom; and
- (vii) that the power of the judge to order production of a statement in recommendation (vi) be provided for.

DECISION Approved - March 3 - 1551 hours.

CHAPTER 25

REPUTATION OF WITNESSES

25.2

Recommendation

The Task Force unanimously recommends that evidence of general reputation be inadmissible to attack or support credibility.

DECISION Rejected - March 9 - 1059 hours.

CHAPTER 26

CROSS-EXAMINATION AS TO PREVIOUS CONVICTIONS

26.14

Recommendations

- (a) by a majority, that evidence of a finding of guilt or conviction of any offence is inadmissible in respect of any witness unless
 - (i) the finding of guilt or conviction was in respect of a crime of dishonesty as determined by the court, or
 - (ii) the court is of the opinion that such evidence in respect of any witness is of substantial relevance to the credibility of the witness; and

DECISION Rejected - March 9 - 1122 hours.

(b) unanimously, that the provision apply to criminal and provincial prosecutions and to civil proceedings.

DECISION Rejected - March 9 - 1122 hours.

26.17 Recommendations

(a) unanimously, that subsection 4(5) of the Canada Evidence Act be retained, and

DECISION Approved - March 9 - 1128 hours.

(b) by a majority, that a subsection be enacted to provide that, notwithstanding subsection (5), where the accused does not testify the judge shall direct the jury as follows: "I have pointed out to you that the burden of proof is on the Crown throughout the case and that there is no burden on the accused to prove his innocence. It follows that while the accused has a right to testify on his own behalf, the law imposes no obligation on him to do so. In this case, he has chosen not to testify", and when the burden of proof is on the accused, on a balance of probabilities, the jury direction would be along the lines suggested in Bathurst's case: "The accused is not bound to go into the witness box, no one can force him to go into the witness box, but the burden is upon him and if he does not, he runs the risk of not being able to prove his case."

DECISION Rejected - March 9 - 1129 hours.

CHAPTER 27 CORROBORATION

27.4 Recommendations

(a) unanimously, that every rule of law that requires the corroboration of evidence as a basis for a conviction, or that requires that the jury be warned of the danger of convicting on the basis of uncorroborated evidence, be abrogated;

DECISION Approved - March 9 - 1135 hours.
Subject also to a recommendation that section 586 of the Criminal Code should be repealed.

(b) by a majority, that the court shall advise the trier of fact of the need for caution in the following cases -

- (i) treason and high treason,
- (ii) the use of unsworn evidence of children of tender years or mentally deficient persons, or
- (iii) the use of the evidence of accomplices (so found by the judge) called as Crown witnesses;

DECISION Approved - March 9 - 1136 hours.
Subject to deletion of adjective "Crown" in recommendation 3 and addition of new category for the use of the evidence of convicted perjurers.

(c) unanimously, that in respect of civil litigation, apart from the warning regarding the use of the unsworn evidence of children of tender years or mentally deficient persons, the Uniform Evidence Act contain no requirement of corroboration or a warning or other comment; and

DECISION Approved - March 9 - 1141 hours.
Subject to addition of further clause "provided that, if a particular jurisdiction feels strongly about the continued need for corroboration or some form of warning, it can introduce the necessary provision in legislation relating to the subject matter".

(d) unanimously, that nothing in this part of the Report be taken as preventing the judge from commenting on the credibility of witnesses other than those mentioned in recommendation (b).

DECISION Approved - March 9 - 1141 hours.

CHAPTER 28

INTERPRETERS AND TRANSLATORS

28.11

Recommendations

(a) unanimously, that if the court determines that a witness does not understand or speak the language in which the proceedings are conducted his evidence shall be obtained through an interpreter;

DECISION Approved - March 9 - 1146 hours.

(b) unanimously, that if the court determines that the accused, or a party in a civil case, does not understand the language of the proceedings he is entitled to the services of an interpreter at all stages of the proceedings;

DECISION Approved - March 9 - 1147 hours.
Subject to addition of the word "use" before "the services of an interpreter", to the addition of the phrase "prior to appeal and thereafter with the leave of the court, where circumstances warrant" and subject to an amendment to section 132 of the draft bill to implement these further recommendations.

(c) unanimously, that in cases falling within operative scope of the Canadian Bill of Rights, the cost of interpretation should be borne by the State, but in other cases by the parties;

DECISION Approved - March 9 - 1340 hours.
Subject to addition after the words "The Canadian Bill of Rights" of "and all prosecutions of offences under provincial statutes".

(d) by a majority, that it is not necessary to spell out a standard for determining whether an interpreter should be employed, as this is a matter than is better left to the judge's discretion;

DECISION Approved - March 9 - 1359 hours.

(e) by a majority, that the extent to which documents need to be translated in order to allow full answer and defence be left to the judge's discretion;

DECISION Approved - March 9 - 1401 hours.

(f) by a majority, that quality control of interpretation and translation be left to court administration rather than the rules of Evidence;

DECISION Approved - March 9 - 1402 hours.

(g) by a majority, that interpreters and translators performing their service in court be required to take an oath swearing that they will make a true interpretation or translation;

DECISION Approved - March 9 - 1403 hours.

(h) by a majority, that where a document is translated out-of-court and is submitted without calling the translator it be accompanied by an affidavit or statutory declaration from the translator verifying that it is a true translation and also setting out the translator's qualifications;

DECISION Approved - March 9 - 1404 hours.

(i) by a majority, that a party opponent have the right to require the attendance of an out-of-court translator for purposes of cross-examination, but in civil cases the judge have the power to penalize that party in costs where the evidence obtained does not materially change the translation or affect the information in the affidavit;

DECISION Approved - March 9 - 1405 hours.

(j) by a majority, that where a translator is called to give evidence of a document, and he testifies that his written translation of the document is a true translation, the written translation be admissible in evidence;

DECISION Approved - March 9 - 1406 hours.
Subject to rewording of recommendation to read "that where a qualified translator gives evidence of the translation of a document and he testifies that his written translation of the document is a true translation, the written translation be admissible in evidence as secondary evidence to explain the original document".

(k) by a majority, that the qualifications of interpreters and translators be established in the same way as those of expert witnesses; and

DECISION Rejected - March 9 - 1423 hours. With the additional recommendation that section 133 of the draft act should be reworded "A person who is to serve as an interpreter or a translator in a proceeding shall, upon the court being satisfied as to his qualifications as an independent interpreter or translator, take an oath or make a solemn affirmation to give a true interpretation or translation of the evidence".

(1) unanimously, that the same rules apply to the deaf and the mute as apply to other persons who do not understand or speak the language of the proceedings, except that the provision found in section 6 of the Canada Evidence Act also be retained and incorporated into the Uniform Evidence Act.

DECISION Approved - March 9 - 1432 hours.

CHAPTER 29

DOCUMENTARY EVIDENCE

29.15

Recommendations

(a) unanimously that the Best Evidence Rule be retained as the basic rule governing the admissibility of documents;

DECISION Approved - March 9 - 1435 hours.

(b) unanimously that the definition of "duplicate" found in section 81(a) of the Law Reform Commission's Evidence Code be adopted and that a duplicate so defined be admissible to the same extent as the original unless the judge is satisfied that there is a reason to doubt the authenticity of the original or the accuracy of the duplicate, in which case he may order the production of the original;

DECISION Approved - March 9 - 1435 hours.

(c) unanimously that the exceptions to the Best Evidence Rule, both common law and statutory, be retained;

DECISION Approved - March 9 - 1437 hours.

(d) that a number of new exceptions to the Best Evidence Rule be recognized, specifically the Task Force recommends

(i) unanimously that where the document is not closely related to a controlling issue in the proceeding, and it would be inexpedient to require production of the original, secondary evidence be admissible;

DECISION Rejected - March 9 - 1438 hours.

(ii) unanimously that where documents are required to be filed by law with a public body, copies are admissible;

DECISION Approved - March 9 - 1441 hours.
Subject to redrafting of recommendation to read "that where documents are required to be filed by law with a public body, and to which the public has access, copies are admissible".

(iii) by a majority that copies made for the court proceedings be admissible where the court is satisfied that it would be impracticable to produce the original;

DECISION Approved - March 9 - 1500 hours.
Subject to substitution of word "are" for "made for the court proceedings be".

(iv) by a majority that summaries of voluminous documentary material be admissible if the proponent satisfies the court that the summary is a fair and accurate one, but that the originals be available for examination and copying by the other parties and for production in court on the order of the court;

DECISION Approved - March 9 - 1503 hours.

(v) by a majority that an explanation be admissible where the original document is in an unreadable form or a form that requires explanation, subject to the right of any party to examine or cross-examine the person giving the explanation, which examination and cross-examination could be considered in determining both admissibility and weight;

DECISION Rejected - March 9 - 1505 hours.
Section 144 of the draft act should be replaced by section 30(4) of the Canada Evidence Act.

(vi) by a majority that the contents of a document may be proved by the testimony or deposition of the party against whom they are offered or by his written admission where the proponent accounts for the non-production of the original;

DECISION Rejected - March 9 - 1531 hours.

(e) by a majority that where a copy is a permitted means of proof of a document, and no copy is obtainable by the exercise of due diligence, other evidence of the contents of the document be admissible;

DECISION Approved - March 9 - 1534 hours.

(f) by a majority that there be a general provision that would give the courts reasonable latitude in determining what to accept as authentication of documents and that this statement be broad enough to encompass all the common law methods of authentication;

DECISION Approved - March 9 - 1548 hours.

(g) unanimously that in order to qualify as an "ancient document" for purposes of authentication a minimum of 20 years have elapsed between its execution and production in the proceedings;

DECISION Approved - March 9 - 1600 hours.

(h) unanimously that the effect of the present authentication provisions of the Canada Evidence Act be preserved but rewritten to eliminate needless repetition and redundancy;

DECISION Approved - March 9 - 1600 hours.

(i) by a majority that the authentication provisions of section 47 of the Canadian Law Reform Commission Code of Evidence be adopted with the addition that foreign documents under the seal of the Minister of Justice of the foreign country be treated as authentic;

DECISION Approved - March 12 - 1017 hours.

Subject of rewording of section 148(1)(i) of draft bill to read "a document purporting to be executed in a jurisdiction other than Canada by a person authorized to do so and bearing the seal of the Minister responsible for the administration of justice in that jurisdiction, or his lawful deputy; and"

(j) by a majority that the Uniform Evidence Act contain a notice provision similar to section 30(7) of the Canada Evidence Act that would apply both in civil and criminal proceedings to all documentary evidence (other than private documents in civil proceedings) that a party intends to produce in his case in chief;

DECISION Approved - March 12 - 1026 hours.
Subject to deletion of last five words "in his case in chief" (to conform to the wording of section 146(1) of Bill, and subject to the addition of the words "unless the court otherwise orders" at the start of section 146(1).

(k) unanimously that there be no general provision permitting examination with the leave of the court of persons who may reasonably be expected to have knowledge of the making or contents of any document, but this should not preclude special provisions in particular cases such as business documents (infra);

DECISION Approved - March 12 - 1030 hours.

(l) unanimously that, subject to special exceptions, documentary evidence be subject to the same rules of exclusion as other evidence;

DECISION Approved - March 12 - 1030 hours.
Subject to rewording of recommendation to read "subject to the special exceptions (infra), documentary evidence be subject to the same rules of exclusion as other evidence;"

(m) unanimously that there be no special judicial discretion regarding the reception or exclusion of documentary evidence;

DECISION Approved - March 12 - 1031 hours.

(n) by a majority that there be no special rules regarding the consideration of documentary evidence by the jury;

DECISION Approved - March 12 - 1031 hours.

(o) unanimously that a document made in the usual and ordinary course of business (hereinafter called a "business document") be admissible in evidence;

DECISION Approved - March 12 - 1031 hours.

(p) by a majority that it not be a condition of admissibility as a business document that the information was recorded at or near the time of the event recorded;

DECISION Approved - March 12 - 1032 hours.

(q) by a majority that personal knowledge of the matter by the supplier of the information not be required as a condition of admissibility of business documents;

DECISION Approved - March 12 - 1032 hours.

(r) unanimously that the foundation facts of admissibility for business documents be proved by the custodian thereof or some other qualified witness;

DECISION Approved - March 12 - 1044 hours.

(s) unanimously that the business records provisions in the Uniform Evidence Act apply not only to original documents but also to copies, temporary as well as permanent records, later as well as first-generation records;

DECISION Approved - March 12 - 1055 hours.
Subject to rewording of recommendation to delete "copies" and substitute "that the business records provisions in the Uniform Evidence Act apply to original documents including temporary as well as permanent records and later as well as first-generation records"; Ontario prefers the wording in section 161 of the draft bill. Further we would add an additional recommendation providing a section parallel to section 161 for recopies of business records.

(t) unanimously that subsections (6) and (9) of section 30 be preserved and by a majority that subsection (6) should apply to determination of both admissibility and weight of business records;

DECISION Approved - March 12 - 1115 hours.
Subject to deletion of the words "business records" in line 16 of section 163 and the substitution of the phrase "document is a business record, and therefore".

(u) unanimously that it not be an impediment to the admissibility of a business document that it contains multiple hearsay or opinion;

DECISION see recommendation (v) infra.

(v) that the Commissioners decide whether proof of the foundation facts for an opinion be necessary when the opinion forms part of a business record;

DECISION Ontario would like to see section 160 reworded to read "on production in a proceeding, a business record is admissible in evidence with respect to any matters stated in the record, whether or not the statement is hearsay within the meaning of section 50 or a statement of opinion, subject, in the case of opinion, to prove that the giving of the opinion was in the usual and ordinary course of business".

(w) unanimously that the absence of an entry in a business or government record that might reasonably be expected to contain such an entry be received as evidence of the non-existence or non-occurrence of the matter, and that in the case of banking records or records kept under the authority of an Act or regulation such evidence be treated as prima facie proof;

DECISION Approved - March 12 - 1123 hours. Subject to deletion of phrase "and that in the case of banking records or records kept under the authority of an Act or regulation such evidence be treated as prima facie proof";

(x) unanimously that in the light of the foregoing recommendations the special provisions in the Evidence Acts regarding the admissibility of photographic copies and microfilms be revoked as being redundant;

DECISION Approved - March 12 - 1123 hours.

(y) unanimously that government and industry be encouraged to follow the procedures as set out from time to time in the National Standard of Canada on microfilm as Documentary Evidence;

DECISION Approved - March 12 - 1123 hours.

(z) unanimously that the business documents and banking documents provisions of the Evidence Acts be integrated to eliminate duplication.

DECISION Rejected - March 12 - 1124 hours.

(aa) by a majority that in addition to other requirements for the admissibility of business documents there be three special conditions of admissibility for computer evidence:

(i) proof that the data upon which the print-out is based is of a type regularly supplied to the computer during the regular activities of the organization from which the print-out comes,

(ii) proof that the entries into the data base from which the print-out originates were made in the regular course of business, and

(iii) proof that the computer programme used in producing the print-out reliably and accurately processes the data in the data base;

DECISION Approved - March 12 - 1126 hours.
Subject to addition of words "unless the computer document (print-out etc.) itself is a business record" to be added before the three sub-categories.

(ab) unanimously that the conditions of admissibility for computer evidence be capable of proof by an authenticating affidavit based on the knowledge and belief of the affiant;

DECISION Approved - March 12 - 1127 hours.

(ac) unanimously that a party, with the leave of the court, may require the testimony of any person concerned in the making, or having knowledge of the contents, of computer evidence tendered in evidence;

DECISION Approved - March 12 - 1127 hours.

(ad) unanimously that the provisions governing the admissibility of computer evidence apply equally to civil and criminal cases;

DECISION Approved - March 12 - 1127 hours.

(ae) unanimously that no recommendation be made regarding the Parol Evidence Rule, but that it be left to the consideration of experts in the substantive law fields affected by it;

DECISION Approved - March 12 - 1127 hours.

(af) unanimously that except where specifically provided to the contrary the recommendations with respect to documents be incorporated into the Uniform Evidence Act.

DECISION Approved - March 12 - 1128 hours.

CHAPTER 30

REAL AND DEMONSTRATIVE EVIDENCE

30.6

Recommendations

(a) unanimously, that the law relating to the authentication of real and demonstrative evidence is developing in a satisfactory manner and no legislation is necessary at the present time;

DECISION Approved - March 12 - 1545 hours.

(b) by a majority, that there be no special discretionary power in the trial judge to reject relevant real or demonstrative evidence on the basis that it is inflammatory, and that the same limit apply with regard to discretionary exclusion of real or demonstrative evidence as applies to other types of evidence;

DECISION Rejected - March 12 - 1545 hours. With recommendation that "in civil cases only there be a special discretionary power in the trial judge to reject relevant, real or demonstrative evidence on the basis that it is inflammatory".

(c) by a majority, that the Uniform Evidence Act contain a provision permitting the trier of fact, both in civil and criminal proceedings, to draw such inferences as are reasonable from real and demonstrative evidence; and

DECISION Approved - March 12 - 1545 hours.

(d) unanimously, that no special provision be introduced respecting the reception of videotaped evidence, but that the use of videotechnology in judicial proceedings be studied in the context of the law of Procedure.

DECISION Approved - March 12 - 1545 hours.

CHAPTER 31

PRIVILEGES RELATING TO MARRIAGE

31.5 Recommendation

(a) unanimously that the privilege with respect to marital communications be abolished in all cases;

DECISION Rejected - March 12 - 1534 hours.
Ontario prefers "that the privilege with respect to marital communications be retained, in all cases, except those listed under section 95 of the draft bill".

(b) unanimously, that any spousal privilege derived from the rule in Russell v. Russell be abolished; and

DECISION Approved - March 12 - 1540 hours.

(c) unanimously, that the spousal privilege relating to adultery be abolished.

DECISION Approved - March 12 - 1540 hours.

Ontario would add three new recommendations.

(d) that the definition of "communication" for the purposes of marital privilege be clarified;

DECISION Approved - March 12 - 1544 hours.

(e) that the privilege, where it exists, be extended to cover both communicating and recipient spouses, except for actions inter se;

DECISION Approved - March 12 - 1544 hours.

(f) that the privilege with respect to marital communications continue to apply notwithstanding the dissolution of the marriage.

DECISION Approved - March 12 - 1544 hours.

CHAPTER 32

PROFESSIONAL PRIVILEGE

32.4

Recommendation

A majority of the Task Force recommends that a privilege be enacted for communications made between an accused and an assessing physician during a remand for observation: such communications would be inadmissible against the accused in any criminal proceeding other than a fitness hearing except where the accused waives the privilege by putting his or her mental state in issue.

DECISION Rejected - March 16 - 1006 hours.

CHAPTER 33

PRIVILEGE AGAINST SELF-INCRIMINATION

33.9

Recommendations

(a) unanimously, that the accused continue to be competent only for the defence as under subsection 4(1) of the Canada Evidence Act;

DECISION Approved - March 16 - 1016 hours.

(b) by a majority, that there be no change in section 578 of the Criminal Code requiring the accused to address the jury before the address by the Crown where he or a co-accused calls any witnesses;

DECISION Approved - March 16 - 1016 hours.

(c) by a majority, that an accused person remain a compellable witness in other proceedings where he is not in jeopardy, subject to his being able to claim the protection of the Evidence Act with respect to the use of his evidence in other proceedings against him;

DECISION Approved - March 16 - 1025 hours.

(d) unanimously, that the Uniform Evidence Act contain a provision abrogating the common law right of the accused to make an unsworn statement from the dock;

DECISION Approved - March 16 - 1026 hours, but
Quaere: Where is this recommendation in the Draft Evidence Act?

(e) by a majority, that the right of the accused to make an unsworn statement in a preliminary hearing under section 469 of the Criminal Code be repealed and replaced by a rule that the accused who wishes to make a statement in answer to the charge do so under oath and subject to cross-examination and that the accused be so informed either by the justice or a court official;

DECISION Approved - March 16th - 1027 hours.

(f) unanimously, that the same rules of competence and compellability apply to persons charged with Provincial or Territorial offences as to persons charged with Federal offences;

DECISION Approved - March 16th - 1027 hours.

(g) unanimously, that the privilege against self-incrimination remain in the form of an immunity against the use of the witness's evidence in other proceedings against him;

DECISION Approved - March 16th - 1027 hours.

(h) unanimously, that the protection apply to all the witness's answers whether incriminating or not;

DECISION Approved - March 16th - 1035 hours, subject to the words "subject to recommendation (m) infra" to be inserted before "the protection".

(i) unanimously, that the protection apply in all other proceedings, civil and criminal, against the witness;

DECISION Approved - March 16th - 1036 hours.

(j) unanimously, that the same protection apply to documents produced by a witness as to his testimony;

DECISION Rejected - March 16th - 1039 hours. Ontario prefers the principle embodied in section 176(4) of the Draft Bill.

(k) by a majority, that a witness only have to claim the protection once rather than with respect to each answer;

DECISION Approved in principle - March 16th - 1041 hours, but we would suggest that this recommendation should be reworded.

(l) unanimously, that a statement given under the protection of the Evidence Act be admissible in a prosecution for perjury in the giving of that or another statement or in a prosecution for the giving of contradictory evidence;

DECISION Approved - March 16th - 1041 hours, but Quaere: Does section 176(2) of the Draft Bill conform?

(m) by a majority, that a statement given under the protection of the Evidence Act be admissible to prove that the witness made a previous inconsistent statement, but only for the purpose of discrediting the witness;

DECISION Approved - March 16th - 1126 hours, subject to rewording of recommendation to read "that where a statement made by an accused under the protection of the Evidence Act is inconsistent with his present testimony, he may be cross-examined on that statement".

(n) unanimously, that the Privilege not apply to corporations, either in terms of non-competence for the Crown or the officers of an accused corporation or in terms of protection against the future use of answers given by corporate officers at any stage of the proceeding;

DECISION Approved - March 16th - 1127 hours.

(o) by a majority, that a jurisdiction requiring a witness by whatever means to testify or to produce documents in one proceeding should provide immunity against the use of the evidence so produced in any other proceeding, civil, criminal or administrative within its constitutional authority; and

DECISION Approved - March 16th - 1130 hours, subject to the alteration of the word "immunity" to "protection".

(p) that as between the Federal Government on the one hand and the Provincial and Territorial Government on the other, respective Evidence enactments recognize the compulsion by the Acts or Ordinances of the other as a basis for granting immunity against the subsequent use of the evidence so compelled.

DECISION Approved - March 16th - 1130 hours.

CHAPTER 34

CROWN PRIVILEGE

34.7

Recommendations

(a) unanimously, that the Uniform Evidence Act give effect to the following recommendations;

DECISION Approved - March 16 - 1131 hours.

(b) by a majority, that any claim of Crown privilege regardless of whether it is made

i) over material which is in writing or reduced to writing or otherwise recorded

ii) over testimony

iii) at a civil or criminal proceeding, or

iv) at a civil discovery proceeding, be subject to judicial scrutiny and that no claim be absolute or conclusive;

DECISION Rejected - March 16 - 1133 hours.

(c) if, contrary to recommendation (b), absolute claims were provided for, it is

i) recommended unanimously, that the following matters of high policy be included as absolute claims:

(A) national defence;

(B) diplomatic relations; and

(C) Cabinet matters comprising Cabinet decisions, discussions in Cabinet, recommendations by a Minister to Cabinet, and background materials prepared exclusively for the purpose of discussion in Cabinet;

ii) that only the Attorney General (or a Deputy) may advance a claim on an absolute ground;

iii) that, in a prosecution, an absolute claim of Crown privilege may, at the instance of the Attorney General having conduct of the prosecution, be examined by a judge;

DECISION Approved - March 16th - 1345 hours, subject to the following amendments: That sub-category (A) should be headed "national security (as properly defined, post MacDonald Report)". That a new head (D) should be added as a matter of high policy dealing with the administration of criminal justice, the precise ambit of which is to be defined by Rod McLeod at the Evidence Conference. Thirdly, that in sub-section (ii) the bracketed expression "or a Deputy" should read "or his lawful Deputy". Fourthly, that the Ontario delegates prefer the precise wording of section 193(1) to the form of words used in recommendation (iii).

(d) by a majority, that where a claim of Crown privilege is advanced on behalf of a government, only the Executive be permitted to advance it and, within the Executive, the Attorney General (or a Deputy) have the exclusive authority to do so;

DECISION Approved - March 16th - 1346, subject to deletion of words "the Executive be permitted to advance it and, within the Executive," and amendment of "or a Deputy" to read "or his lawful Deputy".

(e) unanimously, that when, in a proceeding, a real possibility arises that the disclosure of evidence might harm the public interest, the parties, or where the parties have not acted, the judge, shall notify the appropriate Attorney General in order that he may determine whether or not to advance a claim of Crown privilege on behalf of the government;

DECISION Approved - March 16th - 1408 hours, though the Ontario delegates prefer the wording in Section 180.

(f) unanimously, that there be no prohibition against advancing a claim of Crown privilege even though the disputed evidence may not have been offered if disposing of the issue of privilege early on might expedite the conduct of the proceeding.:

DECISION Approved - March 16th - 1412 hours,
but Quaere: Where is this to be
found in the Draft Bill?

(g) that the form in which a claim of Crown privilege must be presented to a court on behalf of a government be prescribed as follows:

- i) by a majority, that the claim be made orally or in a certificate by the Attorney General (or his Deputy);
- ii) unanimously, that the certificate set out the basis of the claim: the Attorney General (or his Deputy) must, after stating that he has personally examined the disputed evidence (if it is in writing or reduced to writing or otherwise recorded) or heard the evidence (if it is verbal testimony, identify the public interest that would be harmed by disclosure and how the harm might occur;
- iii) that the Uniform Evidence Act list the following factors for consideration by an Attorney General (or his Deputy) and the Court in evaluating the possible harm that disclosure of disputed evidence might cause to the public interest,
 - (A) unanimously, the reasons given for non-disclosure,
 - (B) unanimously, the nature of the information sought,
 - (C) unanimously, the age and current relevance of the information,
 - (D) by a majority, the nature of the proceeding in which the claim arises,
 - (E) unanimously, the necessity and relevance of the information in the proceeding,

- (F) unanimously, the harm or injury to the state and to the party seeking disclosure, respectively,
- (G) unanimously, the extent to which the information has been circulated, both inside and outside government, and by whom,
- (H) unanimously, any other factor considered by the Attorney General (or a Deputy) in deciding to claim Crown privilege;

DECISION Approved - March 16th - 1446 hours, subject to the following amendments: Firstly, in (i) we note that an oral claim is not carried forward into the Draft Bill, and would accordingly suggest that section 181 should be reworded along the lines of "shall certify to the court the grounds of claim". Secondly, we would delete in sub-section (ii) the words "and how the harm might occur" substituting for them the words "and that he has considered the factors set out in (iii)(A)-(G)". Finally, we would add at the end of sub-section (ii) the words "and, in particular, for the purposes of qualified privilege specify his consideration in relation to the factors set out in (iii)(A)-(G) and any other relevant factors". As a corollary to this decision, we would delete category (H).

- (h) unanimously, that in conducting an enquiry into a claim of Crown privilege, the judge,
 - i) examine the certificate and if it is invalid or unsatisfactory, give the government a reasonable opportunity to present a further certificate, and
 - ii) after examining any further certificate tendered by the government, inspect the evidence (if it is in writing, reduced to writing or otherwise recorded) or hear it (if it is verbal testimony) in private, only if he is not, on balance, satisfied that disclosure would harm the public interest, on the basis of the certificate(s);

DECISION Approved as redrafted - March 16th - 1455 hours. Ontario would prefer the section to be sub-divided into two. The first recommendation should read "that in conducting an enquiry into a claim of absolute Crown privilege, the judge, examine the certificate and if on its face it complies with (g)(i) and (ii) and if it is invalid or unsatisfactory, give the government a reasonable opportunity to present a further certificate, and upon receipt of the certificate that on its face complies with (g)(i) and (ii) uphold the claim of Crown privilege. The second recommendation should be in the form set out in the original recommendation (h) with the addition of the words "any other" before "claim of Crown privilege".

(i) unanimously, that a judge who upholds a claim of Crown privilege also be empowered to make the following ancillary orders,

- i) where the government is a party to the proceeding, and it claims Crown privilege that appears to deprive an opposing party of material evidence, the judge may make such further order and direction as the interest of justice may require;
- ii) where a party offers other evidence which tends indirectly to prove the matter excluded under Crown privilege, the judge must exclude the secondary evidence;

DECISION No decision - March 16th - 1530 hours: Ontario awaits further debate in the Evidence Conference.

(j) unanimously, that a judge who rejects a claim of Crown privilege have the power to make an order for disclosure subject to restrictions or conditions which, in his opinion, are appropriate in the circumstances;

DECISION Approved - March 16th - 1535 hours.

(k) unanimously, that the appeal provisions of section 36.1 of the Canada Evidence Act, proposed in the Freedom of Information Bill, be adopted except that the Court of Appeal should have original jurisdiction to determine a claim of Crown privilege when the claim is disputed; and

DECISION Rejected - March 16th - 1536 hours.

(l) unanimously, that Crown privilege may not be claimed over government information to which the public has a right of access under freedom of information legislation.

DECISION Approved - March 16th - 1536 hours.

CHAPTER 35 OTHER PRIVILEGES

35.5 Recommendations

(a) unanimously, that the Uniform Evidence Act not contain a statutory definition of "other privileges" except where otherwise specifically dealt with by the Task Force; and

DECISION Approved - March 16th - 1537 hours.

(b) unanimously, that the Uniform Evidence Act not contain additional statutory privileges except those otherwise specifically dealt with by the Task Force.

DECISION Approved - March 16th - 1537 hours.

CHAPTER 36 JUDGE AND JURY

36.6 Recommendations

(a) unanimously, that the judge not be competent as a witness in a proceeding over which he is presiding;

DECISION Approved - March 16th - 1544 hours.

(b) by a majority, that a member of a jury sworn and empanelled in a trial not be allowed to testify at that trial unless first dismissed as a juror;

DECISION Approved - March 16th - 1544 hours.

(c) unanimously, that the question of competence of jurors to testify in prosecutions for the offences of "obstructing justice" and "disclosure of jury proceedings" be left to be dealt with in legislation relating to juries or criminal procedure rather than in the Uniform Evidence Act;

DECISION Approved - March 16th - 1544 hours.

(d) by a majority, that the Uniform Evidence Act contain no provision regarding who determines preliminary facts;

DECISION Approved - March 16th - 1544 hours.

(e) unanimously, that the Uniform Evidence Act contain no general provision regarding the rules governing voir dires;

DECISION Approved - March 16th - 1544 hours.

(f) unanimously, that in an action for malicious prosecution the law be changed to have the issue of reasonable and probable cause determined by the finder of fact rather than the judge;

DECISION Rejected - March 16th - 1545 hours.

(g) unanimously, that the meaning of words used in their ordinary sense in an instrument or enactment be determined by the judge;

DECISION Approved - March 16th - 1546 hours.

(h) by a majority, that the existence of implied terms in a contract be determined by the finder of fact;

DECISION Approved - March 16th - 1546 hours.

(i) by a majority, that the judge determine as a matter of law whether a covenant in restraint of trade is reasonable;

DECISION Approved - March 16th - 1546 hours.

(j) unanimously, that questions of foreign law be determined by the judge as questions of fact;

DECISION Approved - March 16th - 1546 hours.

(k) unanimously, (re criminal cases) and by a majority (in civil cases), that in determining questions of foreign law the judge be precluded from considering material or sources other than those submitted by a party;

DECISION Approved - March 16th - 1547 hours.

(l) unanimously, that a party intending to raise an issue of foreign law in a civil proceeding give notice of his intention to do so to all other parties to the proceeding in accordance with the rules for exchange of reports of expert witnesses;

DECISION Approved - March 16th - 1547 hours.

(m) by a majority, that if either the Crown or defence intends to raise an issue of foreign law in a criminal case it shall give notice of its intention to do so to all other parties to the proceeding at least seven days before the trial, unless the judge otherwise orders, but production of the material at a preliminary hearing in the proceeding shall constitute notice;

DECISION Approved - March 16th - 1547 hours.

(n) unanimously, that there be no provision in the Uniform Evidence Act attributing any presumptive validity to decisions of other domestic courts on a question of foreign law;

DECISION Approved - March 16th - 1548 hours.

(o) unanimously, that the judicial discretion to exclude otherwise admissible evidence be limited to evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling;

DECISION Approved - March 16th - 1548 hours.

(p) unanimously, that there be no provision in the Uniform Evidence Act concerning

i) the judicial power to exclude evidence on the basis that its reception would "confuse the issue", "mislead the jury", or involve an "undue consumption of time",

- ii) the judicial power to require a party who has introduced evidence of a statement or writing to include evidence of another party of a statement or writing that ought in fairness to be considered at the same time,
- iii) the judge's right to comment on the evidence, or
- iv) appeals from the exercise of judicial discretion.

DECISION Approved - March 16th - 1548 hours.

CHAPTER 37 EVIDENCE ON APPEAL

37.4 Recommendations

In Criminal Appeals

- (a) by a majority, that in proceedings by way of indictment the criteria for determining whether to receive fresh evidence on appeal are and should be as follows:
 - i) the evidence should generally not be admitted if by due diligence it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases;
 - ii) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
 - iii) the evidence must be credible in the sense that it is reasonably capable of belief;
 - iv) it must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result;

in addition to these four principles there is a fifth which is implicit, namely,

- v) the evidence, if it had been available, would have been admissible at the trial;

DECISION Approved - March 16th - 1555 hours.

(b) unanimously, that there be no fixed time limit within which fresh evidence must be adduced;

DECISION Approved - March 16th - 1555 hours, subject to amendment to read "that there be no fixed time limit, other than the normal appeal time rules" within which fresh evidence must be adduced.

(c) unanimously, that the procedure of referring fresh evidence back to the trial judge before going to the court of appeal not be adopted;

DECISION Approved - March 16th - 1555 hours.

(d) by a majority, that for the purpose of determining an appropriate sentence the court of appeal has the right to look at fresh evidence even though the evidence arose after the trial;

DECISION Rejected - March 16th - 1556 hours, and we would suggest that legislation is needed to clarify this area of the law.

(e) unanimously, that if the accused introduces fresh evidence on appeal the Crown has and should have the right to introduce fresh evidence not only in rebuttal but also to show that the verdict was correct;

DECISION Approved - March 16th - 1556 hours, with the proviso that we feel that legislation in this area is needed.

(f) unanimously, that either side have the right to adduce fresh evidence on appeal to show that the verdict at trial was obtained as a result of obstruction of justice by the other;

DECISION Approved - March 16th - 1558 hours, with the proviso that we feel that legislation is necessary.

(g) unanimously, that the Crown not have any general right to introduce fresh evidence on appeal;

DECISION Rejected - March 16th - 1559 hours, as not necessary.

(h) by a majority, that the Crown not have the right to introduce as fresh evidence on appeal the evidence of a witness who, as a result of the crime, was rendered incapable of testifying at the trial;

DECISION Rejected - March 16th - 1601 hours, as not necessary.

(i) unanimously, that no recommendation be made at this time in relation to reception of fresh evidence on appeal in summary conviction cases; and

DECISION Approved - March 16th - 1603 hours.

(j) by a majority, that none of the above recommendations be incorporated in the Uniform Evidence Act.

DECISION Approved - March 16th - 1603 hours, subject to the proviso that recommendations (d), (e), and (f) ought to be enacted in the Criminal Code.

In Civil Appeals

(k) by a majority, that the rules governing the admissibility of fresh evidence in civil appeals be left to the courts in each jurisdiction;

DECISION Approved - March 16th - 1603 hours, subject to rewording to read "that the rules governing the admissibility of fresh evidence in civil appeals be left to the rules of court in each jurisdiction".

Timely Objection

(l) by a majority, that there be no provision in the Uniform Evidence Act concerning timely objection.

DECISION Approved - March 16th - 1604 hours.

